

VOL. XVI

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

10-CR-219S

TONAWANDA COKE CORPORATION
MARK L. KAMHOLZ,

Defendants.

Proceedings held before the

Honorable William M. Skretny, U.S.

Courthouse, 2 Niagara Circle, Buffalo,

New York on March 21, 2013.

APPEARANCES:

AARON J. MANGO,
Assistant United States Attorney,
ROCKY PIAGGIONE, Senior Counsel,
U.S. Department of Justice,
Appearing for the United States.

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JEANNE M. GRASSO, ESQ.,
ARIEL S. GLASNER, ESQ.,
Appearing for Tonawanda Coke Corporation.

RODNEY PERSONIUS, ESQ.,
Appearing for Mark L. Kamholz.

Also Present: Lauren DiFillipo, Paralegal
Sheila Henderson, Paralegal

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1 (Jury not present in the courtroom.)

2 THE COURT: We had a minor juror problem,
3 but I guess he was able to overcome the breakdown
4 in his vehicle, so he's here. Just for the record,
5 the attorneys and parties on Tonawanda Coke are
6 here.

7 Is there anything we have to discuss before we
8 begin?

9 MR. PERSONIUS: Not with Mr. Kamholz, your
10 Honor.

11 MR. LINSIN: Not for Tonawanda Coke, your
12 Honor.

13 MR. MANGO: No, your Honor. Nothing from
14 the government.

15 THE COURT: Okay. Ms. DiFillipo, do you
16 have anything that we need to address?

17 THE PARALEGAL: No. Thank you.

18 THE COURT: Okay. Okay. We have to get
19 organized up here, so it look likes we'll start
20 about 9:45 or so.

21 MR. LINSIN: Thank you, your Honor.

22 MR. MANGO: Thank you, your Honor.

23 (Short recess was taken.)

24 (Jury seated.)

25 THE COURT: Notebooks in hands. Welcome

1 back, ladies and gentlemen. Please have a seat.

2 Okay. The attorneys and parties are back
3 present in the case of United States versus
4 Tonawanda Coke Corporation and defendant Mark
5 Kamholz.

6 Good to have our jury back. We can't do it
7 without you. You know that. Please keep your
8 minds open, and don't lose sight of the fact -- and
9 I'm sure you won't -- that this is an important
10 case to both sides. The government has the burden
11 of proof. That never changes. The defense has the
12 opportunity to put on a defense, if they choose to,
13 in light of the presumption of innocence, and they
14 have. And they're prepared to go forward with, I
15 think, another witness or two today.

16 And, you know, we ask you to keep your minds
17 open and then keep focused on returning a unanimous
18 verdict in this particular case on the 19 counts
19 you will be presented with at the time that you
20 deliberate. So thank you for your work and your
21 attention, and we're almost at Friday, so bear with
22 us.

23 And, Mr. Linsin, I think the defense has a next
24 witness?

25 MR. LINSIN: We do, your Honor. Tonawanda

1 Coke calls Marcia Williams.

2 THE COURT: Okay. Okay. If you would
3 approach the witness stand, but don't enter it, and
4 I'll tell you when to stop, so just keep on going
5 in that direction, and keep on going, going, going.
6 Stop. Look at the jury. We'll have you take an
7 oath.

8 M A R C I A W I L L I A M S, having been duly
9 sworn as a witness, testified as follows:

10 THE COURT: All right. Good morning.

11 THE WITNESS: Good morning.

12 THE COURT: All right. Make yourself
13 comfortable. Make friends with the microphone.
14 We're going to ask you to speak at it and talk in a
15 conversational tone. You probably have to move up
16 a little bit more than that.

17 But you're here to testify for the benefit of
18 the ladies and gentlemen of the jury. A couple of
19 very preliminary instructions. If you don't
20 understand a question, ask the attorney or me, if
21 I'm asking you the question, to clarify. Be as
22 succinct as you can. If you can answer yes or no,
23 please try to do that. Don't volunteer
24 information. That tends to complicate things if
25 you do.

1 If there's an objection, let me rule on the
2 objection first, then I will give you specific
3 instructions. For example, I'll tell you to
4 complete an answer, start the answer all over
5 again, wait for another question, et cetera. Do
6 you understand?

7 THE DEFENDANT: Yes, I do.

8 THE COURT: Okay. I think you'll carry
9 okay. Please state your full name, spell your last
10 name.

11 THE WITNESS: Marcia Williams.
12 W-I-L-L-I-A-M-S.

13 THE COURT: Your witness, Mr. Linsin.

14 MR. LINSIN: Thank you, your Honor.

15 DIRECT EXAMINATION BY MR. LINSIN:

16 Q. Miss Williams, good morning.

17 A. Good morning.

18 Q. How are you presently employed?

19 A. I work for Gnarus Advisors as an environmental
20 consultant.

21 Q. And just for the record would you spell Gnarus?

22 A. Yes. It's actually spelled with a G.
23 G-N-A-R-U-S.

24 Q. And how many years -- how long have you worked
25 as an environmental consultant?

1 A. I've worked as an environmental consultant for
2 about 22 years, but the last two of them have been
3 with -- with my current firm.

4 Q. And prior to your working as a consultant, did
5 you have other experience -- work experience in the
6 environmental field?

7 A. Yes, I have. I've actually been working in the
8 environmental field for a little over 40 years at
9 this point.

10 Q. And can you first give us a quick summary of
11 that work experience, and then I'm going ask you to
12 go into a little more detail in areas.

13 A. Yes. I started working for the predecessor of
14 the Environmental Protection Agency in the fall of
15 1970, and then I stayed on with the Environmental
16 Protection Agency until 1989.

17 THE COURT: What was the predecessor of
18 the EPA?

19 THE WITNESS: It was the National -- the
20 agency I was working for was the National Air
21 Pollution Control Administration, and that was one
22 of the agencies that got pulled into EPA.

23 THE COURT: Okay. Thank you.

24 BY MR. LINSIN:

25 Q. Miss Williams, could I ask you to just turn the

1 mike a little bit toward your face so that -- yeah.
2 I think you'll project a little bit better that
3 way.

4 So you were with EPA for and the predecessor
5 agency for a total of 18 years, is that correct?

6 A. That's correct.

7 Q. All right. Now, before we ask you some more
8 about that experience, could you briefly describe
9 your educational background?

10 A. Yes. I have an undergraduate degree in
11 mathematics and physics from Dickinson College, and
12 I did some graduate work at the University of
13 Maryland in physics, and I've taken a lot of short
14 courses in technical environmental areas, like
15 groundwater and certain types of organic chemistry
16 and so on.

17 Q. And where did you first go to work after
18 finishing college?

19 A. I actually first went to work at a company
20 called ITT Electrophysics Laboratories, and that
21 company -- I was a mathematician there, and I was
22 developing models of the ionosphere, which the
23 company used for defense communications purposes.

24 Q. And --

25 THE COURT: I'm sorry. You developed

1 models of what?

2 THE WITNESS: It's of the ionosphere,
3 which is a level of the atmosphere.

4 THE COURT: Well, how do you know I didn't
5 know what you were talking about?

6 THE WITNESS: I'm sorry.

7 THE COURT: All right. Give us a little
8 bit more on what we're talking about when we talk
9 about the ionosphere.

10 THE WITNESS: It is a little obtuse, I
11 agree.

12 THE COURT: So, what is the ionosphere
13 again?

14 THE WITNESS: It's the level of the
15 atmosphere that a lot of the radio waves and
16 communication waves can bounce off of.

17 THE COURT: Have I been up there? Do you
18 know?

19 THE WITNESS: I doubt it.

20 THE COURT: Okay. All right. Let's go
21 from there.

22 MR. LINSIN: I have requested
23 Miss Williams to be brief in certain areas of her
24 summary, your Honor --

25 THE COURT: Well, when we touch upon the

1 ionosphere, I want to make sure we are not skirting
2 something here, Mr. Linsin.

3 MR. LINSIN: I don't believe RCRA has any
4 jurisdiction up there, your Honor.

5 BY MR. LINSIN:

6 Q. When did you first become employed with EPA or
7 its predecessor?

8 A. In September of 1970.

9 Q. What was your first position with that agency?

10 A. My first position was as a mathematician in the
11 Office of Research and Development, and at that
12 time I was involved with analyzing air pollution
13 data and health effects for the purpose of trying
14 to establish national ambient air quality
15 standards.

16 Q. And how long were you with that office?

17 A. About two years.

18 Q. And after leaving that office, what was your
19 next position within EPA?

20 A. My next position was in the Office of Mobile
21 Source Air Pollution Control. And this is an
22 office that's responsible for developing standards
23 for pretty much any emission source that moves, so
24 cars, trucks, buses, airplanes. And I was involved
25 with developing emission standards for checking the

1 emissions of automobiles in the field. And so we
2 were involved with developing the inspection
3 maintenance test that many of us have to do today
4 to get our cars checked; responsible for developing
5 the fuel economy driving cycle, which is what gets
6 used when EPA says the EPA mileage for this car on
7 the city and the highway is whatever it is. And so
8 those were some of the activities that my office
9 was involved in at the time.

10 During that tenure, I also had an opportunity
11 to serve a four-month special assignment in
12 Congress in the Senate, and that was a period of
13 time when a number of environmental laws were being
14 developed, including the Resource Conservation and
15 Recovery Act.

16 THE COURT: All right. When was that
17 yearwise, timewise?

18 THE WITNESS: It was in 1976.

19 THE COURT: Thank you.

20 BY MR. LINSIN:

21 Q. Now, after leaving the Office of Mobile
22 Sources, what was your next position within EPA?

23 A. My next position was to set up a new office in
24 EPA in the Office of Planning and Evaluation. It
25 was a set -- a group of statisticians, and the

1 function of the office was to evaluate the major
2 regulations that EPA was putting out, before they
3 were issued, to make sure there was adequate
4 analysis and data to support the regulations that
5 were being issued.

6 Q. All right. Now, following your departure from
7 that Office of Planning and Evaluation, you had
8 several positions with the Office of Pesticide
9 Programs and Toxic Substances. Would you describe
10 those collectively and the work you did in those
11 offices, please.

12 A. Yes. The Office of Pesticide Programs was
13 responsible for overseeing the safe use of
14 pesticides in the country, and so I was there for
15 about two years. I then was in a position in the
16 Office of Toxic Substances, and that office is
17 responsible for ensuring the safe use of all other
18 chemicals other than pesticides.

19 And then I was in a position that oversaw both
20 of those offices and also oversaw the enforcement
21 program that was responsible for ensuring that --
22 that regulated entities were compliant with those
23 programs.

24 Q. And just so we can orient ourself timewise, the
25 last position you mentioned in oversight of both of

1 those offices, what time period were you there?

2 A. That was between 1983 and 1985.

3 Q. And what was your title in your oversight
4 position of those two offices?

5 A. I was the deputy assistant administrator, which
6 means I was sort of the senior career official that
7 reported to the political appointee who was running
8 that part of the agency.

9 Q. And after leaving that position as deputy
10 assistant administrator, what was your next
11 position within EPA?

12 A. My next position was to become the director of
13 the Office of Solid Waste. And the Office of Solid
14 Waste was about a 250-person office that was
15 responsible for being the national program manager
16 for the Resource Conservation and Recovery Act
17 programs.

18 Q. I'm sorry. Am I tracking you correctly that
19 you took on those responsibilities as director of
20 the Office of Solid Waste during 1985?

21 A. Yes. It was in early September 1985.

22 THE COURT: And where is that located?

23 THE WITNESS: That was in Washington, DC.

24 BY MR. LINSIN:

25 Q. And would you -- how long did you remain in

1 that position as director of that office?

2 A. I remained in that position until March of
3 1988.

4 Q. And would you describe your responsibilities as
5 director of that office, particularly with respect
6 to the RCRA statute and its implementing
7 regulations?

8 A. At the time I took over this office, Congress
9 had just passed a major set of amendments to the
10 Resource Conservation and Recovery Act, and my
11 office had to issue a lot of new regulations in
12 this window of time. In fact, we issued 40 either
13 proposed or final rule makings within the window of
14 time that I was there, to implement some of the new
15 requirements of the law.

16 In addition, my office was the national manager
17 for the permitting program for RCRA, and this was a
18 time period when RCRA was first getting started
19 with regard to permits. We were also responsible
20 for the corrective action program, which involved
21 cleaning up historical releases at sites that had
22 RCRA permits. And then, finally, my office was
23 responsible for authorizing states to actually
24 implement the RCRA program in lieu of the federal
25 government.

1 Q. During your 18-year tenure with EPA, did you
2 receive any awards or honors?

3 A. I did. I actually received a number of them,
4 and several were ones I was quite proud of,
5 including one I received in 1981, which was given
6 to one person in the federal government, the entire
7 federal government, each year, under the age of 37,
8 for excellence in public administration. And then
9 when I left the agency, I was given a distinguished
10 career award.

11 Q. All right. Now, during your tenure with EPA,
12 did you have contact with the companies and
13 entities which the EPA was regulating?

14 A. Yes. Very much. That was a very important
15 part of the job, because we would have a lot of
16 contact during the time when we were developing new
17 regulations, in the hopes that we could collect all
18 the input that was necessary. And then we would
19 continue to have a lot of contact after we issued
20 the regulations, because our goal was to try to
21 make sure we could get information out into the
22 world into the field so that --

23 THE COURT: Could you slow down just a
24 little bit, please?

25 THE WITNESS: Yes, I'm sorry.

1 THE COURT: Thank you.

2 THE WITNESS: So that the -- so that the
3 regulated parties would understand the regulations
4 that we had just issued.

5 BY MR. LINSIN:

6 Q. All right. Did you also have contact -- in
7 order to perform the responsibilities you've
8 described, did you also have contact with
9 nonregulated parties?

10 A. Yes, we did. There was a large group of
11 interested entities in the regulations that EPA was
12 developing, so we had a lot of inputs from
13 environmental groups, from labor groups, from
14 university research people, and consultants. So it
15 was quite a large group of people that we were
16 interacting with.

17 Q. Now, during your work with EPA, were you at
18 times involved in directing enforcement activities
19 or oversight of compliance activities?

20 A. Yes, I was. I think I mentioned briefly that
21 when I was in the Office of Pesticides and Toxic
22 Substances I actually supervised the headquarter's
23 enforcement office for that program.

24 When I was in the Office of Solid Waste, there
25 were several ways in which I was involved in

1 enforcement. One, I was involved with developing
2 with our sister office, the enforcement office,
3 individual strategies for each new regulation in
4 terms of how we were going to go about doing
5 enforcement.

6 Secondly, I was involved in the development of
7 the 1988 RCRA inspector manual that was given out
8 as guidance to our regions and to the state
9 inspectors.

10 And then, finally, on an annual basis we would
11 go out to a representative set of the EPA regions
12 and perform oversight functions in terms of how the
13 regions were implementing both the permit program
14 and the enforcement program.

15 Q. And there is some water there for you there if
16 it would be helpful. I know it's a lot of talking.

17 Now, what year did you leave EPA?

18 A. I left EPA in 1988.

19 Q. All right. And where were you next employed
20 after leaving that agency?

21 A. I was employed at Browning-Ferris Industries.
22 It's a large -- at the time it was a large
23 international waste company, managed all different
24 types of wastes.

25 Q. All right. And how long were you employed by

1 BFI?

2 A. For about three and a half years.

3 THE COURT: Was that home office in Texas?

4 Is that where that was?

5 THE WITNESS: It was in Texas.

6 BY MR. LINSIN:

7 Q. All right. And what were your duties and
8 responsibilities during the three years you were
9 with BFI?

10 A. I had several different -- I wore several
11 different hats during this period of time. One of
12 them was to be involved and run the federal
13 regulatory affairs program. I also was the
14 co-chair inside the company for the company's
15 environmental policy committee. For a period of,
16 maybe like a year, year and a half of that time
17 frame, I was also involved with -- as the
18 vice-president of our hazardous waste subsidiary,
19 in terms of environmental permitting and
20 compliance.

21 Q. Now, during your employment with BFI, did you
22 continue to have contact and involvement with the
23 U.S. Environmental Protection Agency?

24 A. Yes, I did, both in the -- in the role of BFI
25 being an interested entity that would comment upon

1 new regulations and make sure it understood those
2 regulations so they could apply it within the
3 company, and also sometimes with the regional
4 offices and certainly with the states, because we
5 had facilities located in these many different
6 places, including New York, and we would work with
7 the state agencies.

8 Q. And after leaving BFI in 1991, where were you
9 next employed?

10 A. At that point I started my own environmental
11 consulting firm. It was a small firm. And I did
12 that for about six years, and then I folded my
13 company into a larger firm.

14 Q. And since that time, with various companies
15 have you continued to work as an environmental
16 consultant?

17 A. Yes, I have.

18 Q. So over these past 12, 13 years, could you
19 please describe for the jury what types of clients
20 you have -- for whom you have consulted and what
21 types of work you have done for them.

22 A. Consulted for a very large number of both
23 companies big and little as well as governments.
24 I've done work for the U.S. Government, I've done
25 work for the governments, for example, of Canada

1 and of Mexico. I've also done work for many
2 companies in pretty much a whole wide range of
3 types of companies, auto companies, aerospace
4 companies, chemical companies, food companies. And
5 the work -- my work tends to focus on either
6 chemical- or waste-related issues.

7 Q. Now, during this time as a consultant, have you
8 ever declined to take on prospective clients in
9 connection with criminal litigation?

10 A. Yes, I have. If I review the facts of the
11 situation and I feel that there's not a way that I
12 could provide reasonable assistance to them, I
13 would decline to take it, and that has happened.

14 Q. Have you, Miss Williams, ever served on any
15 advisory panels with respect to environmental
16 compliance issues?

17 A. Yes, I have. I've served on several
18 subcommittees of the National Academy of Science
19 that have dealt with waste- or chemical-type
20 issues. I've also served on some subcommittees of
21 the EPA Science Advisory Board.

22 Q. Have you ever taught any environmental courses?

23 A. Yes, I have. I've -- I've taught RCRA courses
24 both inside companies that have come to ask me to
25 teach, and I've also actually taught RCRA

1 commercially, where anybody interested could come
2 take the class. And I've also taught courses on
3 environmental auditing to companies that want to
4 understand how to do inspections of their own
5 facilities.

6 Q. Have you ever given testimony before the United
7 States Congress on RCRA-related issues?

8 A. Yes, I have. Between 1980 and nineteen --
9 mid-'90s, I would say maybe about a dozen times.

10 Q. Have you ever written any articles or given
11 speeches on RCRA issues?

12 A. Yes. Both. I've given a large number of
13 speeches, and have written articles, although not
14 probably in the last ten years.

15 Q. All right. And, Miss Williams, have you
16 previously testified in court or provided testimony
17 in depositions as an expert witness with respect to
18 RCRA issues?

19 A. Yes. About -- probably about 15 times.

20 Q. Now, one last question on your background and
21 experience. Is -- is all of your RCRA-related work
22 as a consultant in the context of litigation?

23 A. No. In fact, the majority of my work that
24 covers RCRA is actually consulting work, not
25 litigation work. I often go in because a company

1 wants to have my help in making their compliance
2 program stronger, or to understand how good their
3 compliance program is, or to help them figure out
4 some way to recycle a material within the construct
5 of RCRA.

6 MR. LINSIN: Your Honor, at this time
7 Defendant Tonawanda Coke proffers Miss Williams as
8 an expert under Rule 702 of the Federal Rules of
9 Evidence, to provide testimony regarding -- and
10 opinions regarding the history and development of
11 the federal RCRA program, the relationship between
12 EPA and state environmental agencies in
13 RCRA-authorized states, the scope and purpose of
14 RCRA compliance inspections, and the interpretation
15 and application of the RCRA regulations with
16 respect to recycling and the RCRA permitting
17 program.

18 THE COURT: Okay. Mr. Piaggione?

19 MR. PIAGGIONE: No objection, your Honor.

20 THE COURT: All right. Mr. Personius?

21 MR. PERSONIUS: No objection. Thank you,
22 Judge.

23 THE COURT: Okay. Then again, ladies and
24 gentlemen, you have tendered to you an expert
25 witness. You've heard the scope of the expertise

1 described by not only testimony, but summarized by
2 Mr. Linsin in his proffer with respect to this
3 witness.

4 You are to consider the witness's testimony as
5 you would any other witness who testifies, in terms
6 of your assessing believability, credibility, and
7 what weight, if any, to give to her testimony.
8 She's here to assist you in the areas of her
9 particular expertise, which may not be necessarily
10 the information or knowledge that you have that
11 would make it comfortable for you to decide certain
12 aspects of the testimony or the case or the issues.

13 So you may consider her areas of expertise in
14 proceeding to reach your resolve on the fact issues
15 in this particular case. You decide, though, how
16 much weight, if any, to give to her testimony.

17 Thank you.

18 MR. LINSIN: Thank you, your Honor.

19 BY MR. LINSIN:

20 Q. Miss Williams, when did you first become
21 engaged to work in this matter?

22 A. It was April of 2010.

23 Q. And since that time, approximately how much
24 time have you spent reviewing information and
25 materials and preparing for your testimony?

1 A. About 200 hours over that time period.

2 Q. Would you summarize, please, for the members of
3 the jury the case-specific documents you reviewed
4 during the course of your work on this case?

5 A. I started out by reviewing the criminal
6 indictment in the case. I then reviewed a large
7 number of site-specific types of documents,
8 including the inspections that had been performed
9 by the DEC. I also included -- reviewed various
10 types of correspondence, emails, associated with
11 the site. And -- and then more recently I made
12 sure I had reviewed all of the documents that the
13 government expert witnesses had cited as their own
14 reliance materials.

15 Q. And in addition to those materials, did you
16 review any additional documents that you have in
17 your possession at Gnarus Advisors?

18 A. Yes. I have a large library of materials
19 relevant to RCRA, and I did review many of those as
20 well.

21 Q. Did you visit the Tonawanda Coke facility in
22 Tonawanda, New York?

23 A. I did not visit the facility, but I have had an
24 opportunity to look at a lot of the photographs,
25 including photographs that have been entered as

1 exhibits into this case.

2 Q. Did you review any statements or testimony of
3 Tonawanda Coke employees and the DEC regulatory
4 personnel?

5 A. Yes. I was able to review a number of the
6 interview reports that were prepared by government
7 investigators with regard to the individual
8 Tonawanda Coke Corporation employees. I was able
9 to review trial testimony of a number of employees
10 that was presented in this case, and I was also
11 able to review trial testimony of Mr. Corbett and
12 of Mr. Flax, and then I was able to be present in
13 court just this past Monday to hear the testimony
14 of Mr. Strickland.

15 Q. All right. Now, based upon the work you've
16 just summarized, did you reach any opinions as to
17 whether the RCRA regulations required Tonawanda
18 Coke to obtain RCRA permits for the company's
19 activities with respect to the management of the
20 K087, decanter tank tar sludge, and D018 materials
21 found around the Barrett tanks?

22 A. Yes, I did.

23 Q. Now, before I ask you to address the opinions
24 regarding those specific issues, I'm going to ask
25 you a series of questions -- general questions

1 about RCRA and its regulations. First of all, can
2 you briefly summarize the general purposes of the
3 RCRA statute?

4 A. Yes. There are really two very important
5 purposes of this statute. One is to ensure the
6 safe management of waste, and the second is to
7 encourage resource conservation through proper
8 reuse and recycling.

9 Q. Now, during the work experience that you
10 summarized, were you involved in developing and
11 applying RCRA regulations with respect to solid
12 waste and recycling activities?

13 A. Yes, I was. And in fact, when I became the
14 director of the Office of Solid Waste in 1985, a
15 major new regulation had just recently been issued
16 that dealt specifically with what is a solid waste.
17 And so as soon as I joined that office, we were
18 spending a lot of time developing guidance and
19 making sure people understood those particular new
20 regulations.

21 Q. Now, under RCRA and its regulations must a
22 material be a solid waste and a hazardous waste in
23 order to be regulated under the RCRA permitting
24 program?

25 A. Yes. It needs to be both, because it has to

1 both be a waste as well as being hazardous.

2 Q. All right. So, can you briefly describe
3 what -- under the RCRA regulations, what makes a
4 solid waste a hazardous waste?

5 A. There are really two categories of types of
6 hazardous wastes. The regulations identify a very
7 long list of very specific types of waste as being
8 hazardous. And this is just a set of maybe 400
9 different narrative definitions. So that's one way
10 a waste can be hazardous.

11 The other way a waste can be hazardous is --
12 the regulations identify four characteristics that
13 a waste might possess. So, for example, a waste
14 might be ignitable. And the regulations specify
15 test procedures or a very detailed description of
16 what those characteristics are. So waste could be
17 hazardous because it possesses one of those
18 characteristics.

19 THE COURT: All right. I mean, just so I
20 understand, when you talk about the 400 or so,
21 you're talking about listed wastes by name?

22 THE WITNESS: Yes.

23 THE COURT: All right. And then the
24 second category is those waste items that exhibit
25 certain characteristics that might meet the listing

1 of characteristics that would make something
2 hazardous?

3 THE WITNESS: That's correct. So
4 there's -- there's -- one of the characteristics is
5 ignitability. Another one is corrosivity. Another
6 one is reactive, and the fourth one is called
7 toxicity, and there's multiple ways a waste could
8 be toxic.

9 THE COURT: All right. Thank you.

10 BY MR. LINSIN:

11 Q. So, with respect to this particular case, is
12 there a listed hazardous waste that is relevant to
13 the facts and issues that you've identified in this
14 case?

15 A. Yes. The listed waste is the waste called K087
16 that's been involved in the testimony already.

17 Q. All right. And is it correct that this listed
18 waste, hazardous waste, is defined in narrative
19 form in the EPA RCRA regulations as decanter tank
20 tar sludge from coking operations?

21 A. That's correct.

22 Q. Now, is there also a characteristic hazardous
23 waste that is relevant to the facts and testimony
24 in this case?

25 A. There is. There is a waste known as D018, D18.

1 And that is characteristic waste because the level
2 of benzene in that waste, when tested under the
3 prescribed test procedure, exceeds the level that
4 would cause it to be hazardous.

5 Q. So that would be -- am I correct that that
6 would be a characteristic hazardous waste because
7 of its toxicity for benzene?

8 A. Yes. That's correct.

9 Q. All right. Now, under the RCRA regulations how
10 do you determine whether or not, first of all, a
11 material is classified as a solid waste for the
12 purposes of the RCRA hazardous waste program?

13 A. The -- the regulations and the statute,
14 actually, as well, define waste in terms of the
15 concept of discard. Now, that's a pretty easy
16 concept when you're thinking about I have a coffee
17 cup, I'm done with it, I'm going throw it away.
18 And in a similar way, at an industrial plant if you
19 have a material and you say I don't need any more
20 of this chemical or I don't need this material, I'm
21 going to throw it away, clearly there's discard
22 involved. It gets more complicated than that when
23 recycling is involved.

24 Q. All right. And how do the RCRA regulations
25 address this concept of recycling?

1 A. The RCRA regulations have tried to divide
2 recycling into two categories. Let me put it that
3 way. One category is recycling that looks like
4 normal production operations, and the other
5 category is recycling that looks like waste
6 treatment-type operations. And the regulations
7 define a number of different types of secondary
8 materials and a number of different ways in which
9 those materials could be recycled, and then decides
10 which of these categories and activities look like
11 production and which of them look like waste
12 treatment or waste activities. So if the material
13 looks like -- if the material and the activity look
14 like production, the RCRA regulations exclude that
15 from being a solid waste.

16 Q. And what is the term of art under the RCRA
17 regulations that relates to that situation where
18 the material and the process looks like normal
19 production?

20 A. That's usually referred to or often referred to
21 as ongoing or continuous production process.

22 Q. All right. And you used the term "secondary
23 material." Would you describe, please, what that
24 means under the RCRA regulations?

25 A. That's a general term that the regulations use

1 to capture any kind of material that's generated as
2 part of an industrial or commercial process that
3 could be a waste, depending on how that material
4 ends up being recycled.

5 Q. Now, as you know, decanter tank tar sludge has
6 been a focus of this case, and it is involved in
7 one of the counts in the indictment. Is decanter
8 tank tar sludge considered a secondary material
9 under the RCRA regulations?

10 A. Yes, it is.

11 Q. And is decanter tank tar sludge also a listed
12 hazardous waste?

13 A. Yes, it is.

14 Q. Now, under these regulations with respect to
15 K087, how do you determine whether it is a solid
16 waste?

17 A. Well, the first step then is to go back to the
18 regulations and say is this material discarded
19 during the process of being recycled. And so
20 that's the question that one needs to grapple with.
21 Is the way in which this material is being
22 recycled -- and in this case at Tonawanda Coke --
23 would that look like a normal production activity
24 or would that look like a waste treatment activity.
25 In one case it would be excluded from the

1 definition of solid waste. If the decision was it
2 looked like waste treatment -- waste-like activity,
3 then it would be covered by RCRA as a solid waste.

4 THE COURT: Say that again for me, please.
5 Just repeat that answer.

6 BY MR. LINSIN:

7 Q. Yeah. Let me see if I can break this up. And
8 it is an important issue I'd like to the Court and
9 the jury to be clear on.

10 How -- we have this listed hazardous waste.
11 It's listed in the regs. It's defined as a
12 hazardous waste. But how do you properly, under
13 the RCRA regulations, then first determine whether
14 this already listed hazardous waste meets the
15 definition of solid waste?

16 A. You need to look at whether or not the way in
17 which it's being recycled looks more like a normal
18 production activity or looks like a waste activity.
19 And you do that by looking at the regulations and
20 seeing whether the regulations identify the type of
21 behavior, the type of recycling, as production-like
22 or not.

23 THE COURT: When you say waste activity,
24 I'm sorry, but --

25 MR. LINSIN: No, I apologize, your Honor.

1 THE COURT: Is that the same as relating
2 to recycling activity? Is waste activity and
3 recycling activity synonomous?

4 THE WITNESS: No. Let me try and explain
5 that. It's very important.

6 RCRA regulates the treatment, storage, and
7 disposal of solid waste that are also hazardous
8 waste. RCRA does not actually regulate the
9 recycling process itself. So the first step, you
10 look at the recycling process, you look at the
11 regulations, and the regulations look at the type
12 of material. In this case it's K087, listed
13 secondary material. And you look at how that's
14 being recycled. And in this case it was being
15 recycled on the coal piles in the coalfield to be
16 put back into the coke ovens to be reused. And I
17 look at that combination, and the regulations
18 address the question of whether that's a
19 production-type material that's excluded from the
20 definition of solid waste versus a -- an activity
21 that's covered by the definition of solid waste
22 because it looks like RCRA storage, treatment, or
23 disposal.

24 BY MR. LINSIN:

25 Q. Let me try it this way, if I can. Within this

1 definition of solid waste -- and is it fair to say
2 it's a fairly complicated definition?

3 A. Yes, it is.

4 Q. All right. Within this definition of solid
5 waste, this first stop, if you will, in
6 understanding how RCRA applies, are there certain
7 categories of recycling activities that, if they
8 bear these indications of treatment, storage, or
9 disposal that you just referenced, that that
10 regulatory definition for solid waste says, huh, if
11 you're engaged in recycling that looks like this,
12 then we're going to treat the material as a solid
13 waste, is that correct?

14 A. That is correct.

15 Q. All right. But again, according to that
16 definition, if the recycling activity doesn't meet
17 those indicia --

18 MR. PIAGGIONE: Objection, your Honor.

19 This is going on again with the leading, a
20 narrative. Let the witness testify to these things
21 if that's the case.

22 THE COURT: No. The witness has to
23 understand the question, and the question, I think,
24 is a fair question if you'd let it get completed.
25 Overruled. You may continue.

1 MR. LINSIN: Thank you, your Honor.

2 MR. PIAGGIONE: I would just point out,
3 your Honor, that she testified just a moment ago
4 that she said RCRA does not regulate recycling, and
5 now he's asking her how RCRA regulates recycling.

6 THE COURT: And what's your point here?

7 MR. PIAGGIONE: It's already been asked
8 and answered that it doesn't, according to her.

9 THE COURT: No. Overruled.

10 MR. LINSIN: Thank you, your Honor.

11 BY MR. LINSIN:

12 Q. Let's -- let me try this again, Miss Williams.
13 Within the definition of solid waste, are there
14 sections that address this concept of recycling?

15 A. Yes.

16 Q. And within the definition of solid waste, do
17 the regulations determine, based on those
18 components of the definition, that some recycling
19 activities are going to be treated as solid waste?

20 A. Yes.

21 Q. All right. And what are the factors in that
22 definition of solid waste that determine if some of
23 those recycling activities are actually going to be
24 treated as a solid waste under the definition?

25 Would you explain that to the members of the jury?

1 A. The regulations identify the types of materials
2 and the types of recycling that qualify as solid
3 waste. Likewise, they identify the types of
4 materials and the types of activities that don't
5 classify as solid waste. So you have to look at
6 the material and the way in which it's being
7 recycled, and the regulations will answer the
8 question of whether that's a waste -- a solid waste
9 or whether that's not a solid waste.

10 Q. So, under the regulations, under this
11 definition of solid waste and the other RCRA
12 regulations, if recycling is accomplished as a part
13 of a continuous production process, is it covered
14 within the definition of solid waste?

15 A. No, it's not. This is one of the examples of
16 the ways in which the regulations exclude materials
17 from being a solid waste. If the material is in a
18 continuous production process, it is not a solid
19 waste under RCRA.

20 In fact, if the material is -- comes out of a
21 production process and gets reinserted directly
22 into a different production process, that's another
23 way that a material would be considered excluded
24 from RCRA, not a solid waste.

25 THE COURT: Yeah, but it has to be both a

1 solid waste and hazardous to be covered by RCRA,
2 according to your testimony.

3 THE WITNESS: That's correct.

4 BY MR. LINSIN:

5 Q. Now, what if K087 -- well, I think we've
6 already covered this now.

7 Do the RCRA regulations, if a material had --
8 meets this definition of solid waste, and also then
9 is determined to be -- well, are there other
10 exemptions that have been added to the overall RCRA
11 program that exclude materials that are deemed to
12 be solid waste from the permitting requirements?

13 A. Yes. Again, if -- when you start, there's a
14 set of materials that never enter the system as a
15 solid waste. There's a set that do. Within that
16 set of materials that classify as a solid waste,
17 the regulations have added additional exclusions,
18 and those additional exemptions or exclusions have
19 been developed and added to the regulations as new
20 information is collected that suggest that there's
21 other ways that some of these materials can be
22 recycled that really don't have any elements of
23 discard involved with them. So these exemptions
24 were developed to further exclude material that
25 didn't really have discard associated with them.

1 Q. All right. Now I'll see if I can ask this
2 question clearly enough. Is it possible that under
3 the regulatory structure you're describing -- is it
4 possible that a material can be classified as
5 outside the definition of solid waste, in the
6 continuous production process you were just
7 describing for recycling, but also covered by a
8 specific RCRA exemption that has now been added to
9 this definition of solid waste?

10 A. The answer to that question is yes. And let me
11 explain why that happens. When a new exemption
12 gets added into the definition of solid waste
13 regulations, it's usually more targeted than these
14 general -- these general exclusions that might say
15 any continuous production process is not covered as
16 a solid waste under RCRA. It's not industry
17 specific; it's just a general exclusion.

18 When a new exclusion is added, it's typically
19 very specific to a type of waste or a type of
20 industry. And that exclusion is usually added
21 because it allows some activities that were
22 previously covered to now be excluded. But it's
23 often frequently the case that some of the
24 activities that are capable of being covered under
25 this new exclusion were already excluded because

1 they didn't meet the basic regulatory definition of
2 a solid waste.

3 So there's usually some new material that gets
4 out with the new exclusion, but some of the
5 material could already have been excluded because
6 it didn't meet the basic factual definition of
7 discard.

8 THE COURT: All right. Let me just ask
9 you this. And it's in light of Mr. Linsin's
10 question. He referenced -- and maybe I have this
11 wrong, but a listing of waste substances that are
12 not waste. I mean, the breakdown is -- includes
13 listed substances that are waste materials, right?
14 Are waste substances. They're listed.

15 THE WITNESS: Yes.

16 THE COURT: All right. Now, your question
17 said outside the listed substances. Is there a
18 list of substances that are not listed that are set
19 forth? Do you understand the question?

20 THE WITNESS: Maybe. Let me try and see
21 if I could explain a little bit more about
22 secondary materials. I think it might help.

23 THE COURT: All right. Because as I
24 understood the question, you referenced outside the
25 list of substances that --

1 MR. LINSIN: Well, I had intended to
2 say -- I perhaps said list, but what I was talking
3 about -- and let me restate the question. Is it
4 possible that a particular material can be
5 classified as outside the definition of solid waste
6 but also covered by one these exemptions that has
7 been developed? So outside the definition of solid
8 waste, but also then addressed in a new exemption?
9 And, your Honor, if I may go one question further,
10 it may help clarify this.

11 THE COURT: Okay.

12 BY MR. LINSIN:

13 Q. In this case is there one of these particular
14 exemptions to the definition of solid waste that
15 relates to K087?

16 A. In -- yes. In 1992 the regulations -- the
17 federal regulations were modified to add a specific
18 exemption that addressed K087 under certain
19 conditions.

20 Q. And what are those conditions? Let's put that
21 on the table.

22 A. Those conditions involved the fact that the
23 material would have to be managed without any land
24 disposal involved prior to the time that it -- that
25 it was introduced into the recycling process.

1 Q. But to see if I understand your testimony, are
2 you also saying that even though this exemption
3 regarding K087 material was enacted in 1992, is it
4 also your testimony that if -- even without that
5 exemption, if this same material, K087, decanter
6 tank tar sludge, was being managed as a part of --
7 and recycled as a part of a continuous production
8 process, that that would never have fit within the
9 definition of solid waste to begin with?

10 A. That is correct.

11 Q. And you referenced a moment ago that it's
12 important to understand -- in order to understand
13 your response, to understand this concept of a
14 secondary material. Would you explain that.

15 A. Well, in the definition of solid waste, certain
16 types of secondary materials are exempt from the
17 definition of solid waste. And one of those would
18 be materials like a K087 material, which is
19 considered a by-product of the manufacturing
20 process. That type of a secondary material is
21 exempt from the definition of solid waste when it
22 is reinserted back into the production process.

23 So one doesn't need to get to the special
24 exemption in the case where you're directly
25 reinserting it back into the production process.

1 If, instead of that, you are perhaps first
2 reclaiming it, you are doing something else to it
3 before you reinserted it, then that would be, in
4 fact, covered as a solid waste.

5 So it depends not only on the fact that it's
6 K087, but what type of recycling were you doing
7 with it. The definition of solid waste excludes it
8 if you weren't, for example, reclaiming it first.
9 When EPA added the new definition -- new exclusion
10 in 1992, it said as long as you follow the
11 regulation that we lay out with this exclusion,
12 now, if you wanted to, you could reclaim it first.
13 So it gave some additional relief, if you want to
14 say, that the original regulation didn't provide.
15 Q. But that '92 exemption was premised on, as you
16 testified, there being no intervening land
17 disposal, correct?

18 A. That's correct.

19 Q. All right. Now, we will get to that concept in
20 a little bit. In nineteen ninety -- I'm sorry --
21 in 2008 were there new exemptions added to this
22 RCRA definition of solid waste?

23 A. Yes. There were a couple of quite broad new
24 exemptions that addressed on-site recycling at any
25 type of a facility. And one of the interesting

1 things or useful things about these regulations is
2 that they introduced the terminology of something
3 called a land-based production unit. And what
4 these regulations clarified is that a land-based
5 production unit, you can -- it's allowable to
6 recycle in a land-based production unit even if
7 there's a preclusion from land disposal as part of
8 that exclusion.

9 Q. And can you give the jury some examples of what
10 would qualify under this new exemption, this 2008
11 exemption, as a land-based production unit? Any
12 industries that utilize these land-based production
13 units on a regular basis?

14 A. The mineral -- the mineral processing industry
15 uses these quite frequently. So let me give you a
16 very specific example. In gold and in copper
17 processing it's very common to actually process the
18 feedstock in a land-based unit, and secondary
19 material, acid, is utilized on these heap leach
20 piles, essentially. And that occurs on the ground.
21 But that is a production process. So that would be
22 an example of a land-based production unit.

23 Q. And a land-based production unit that is not
24 considered land disposal under the regulations, is
25 that correct?

1 A. That is correct.

2 Q. Does the recycling process itself require a
3 RCRA permit?

4 A. No. The recycling process itself does not
5 require a RCRA permit. If the material is
6 stored -- if the material is a solid waste and a
7 hazardous waste and it's stored before it starts to
8 be recycled, then it would require a RCRA permit.

9 Q. A RCRA storage permit, correct?

10 A. A RCRA storage permit, or a RCRA treatment
11 permit if it was treated first. But once it enters
12 the recycling process itself, that's considered
13 normal production, and it doesn't require a RCRA
14 permit.

15 Q. Now, do the RCRA regulations govern the
16 recycling process if it involves the placement of
17 secondary material directly on the ground during
18 recycling?

19 A. No. Again, if there was material placed
20 directly on the ground prior to the start of
21 recycling, that would require a permit. But if the
22 material enters the recycling process and the
23 recycling process is legitimate recycling and it's
24 taking place on the ground, there's not a
25 requirement to have a permit.

1 THE COURT: If it's legitimately what?

2 THE WITNESS: If it's legitimate

3 recycling.

4 BY MR. LINSIN:

5 Q. And would you expand on that. Is this concept
6 of legitimate recycling meaningful in interpreting
7 these RCRA regulations you're testifying about?

8 A. It is. There have been many characteristics
9 that have been developed that describe what
10 constitutes legitimate recycling. And essentially
11 what -- what gets looked at is how much does this
12 recycling look like -- how much does the material
13 that you're recycling and the way in which you're
14 recycling it look like an analogous raw material or
15 an analogous product. Is there a guaranteed market
16 for this activity, material that you're developing
17 through the recycling process? Are you storing the
18 material and managing it similarly to the way you
19 would manage raw materials, normal feedstocks? So
20 there are -- those are some of the things that get
21 looked at to determine whether the recycling is
22 legitimate recycling.

23 Q. Okay. All right. Now, if there are accidental
24 releases or spills from a legitimate recycling
25 process, would that material being recycled --

1 would that make the material being recycled a solid
2 and potentially a hazardous waste?

3 A. In my experience, that would be extremely
4 unusual. I can't really think of a situation in my
5 experience where that happens. Any more than in a
6 normal production process, if you go to almost any
7 kind of a big plant, there can be spills, there can
8 leaks, inadvertent activities.

9 Those have to be addressed, cleaned up
10 potentially, so that often happens through the
11 Clean Air Act, through the Clean Water Act, and
12 sometimes if there's been a big release and it
13 hasn't been properly cleaned up, it can be required
14 to be cleaned up using various remedial-type
15 environmental authorities. But it doesn't turn the
16 production process into a RCRA waste activity.

17 And recycling would be a similar situation.
18 Once the material enters recycling, it's considered
19 to be in a production-like phase, and a leak or a
20 spill would be addressed through another mechanism,
21 not through a RCRA permit.

22 Q. All right. Now, you've testified that
23 recycling in the manner in which you've described
24 does not require a RCRA permit. My question now
25 is: What types of activities do require a RCRA

1 permit?

2 A. Well, if you have both a solid waste and a
3 hazardous waste and you want to store that
4 material, you want to treat that material, or you
5 want to dispose of that material, you would need to
6 get a RCRA permit for those activities. And that
7 would include if you had a solid waste and
8 hazardous waste and you wanted to store or treat it
9 prior to the time you started to recycle it.

10 Q. All right. Now, what are the land disposal
11 regulations under RCRA?

12 A. The land disposal regulations were some very
13 important --

14 MR. PIAGGIONE: Objection, your Honor. I
15 believe now we're going into the land disposal,
16 which I believe we're not permitted to talk about,
17 pursuant to your order.

18 The Court has already defined that term.

19 THE COURT: I think you better come up
20 here. I'm not sure what you're referring to.

21 (Side bar discussion held on the record.)

22 MR. PIAGGIONE: Your Honor, you issued an
23 order which defined land disposal. We were
24 precluded, our experts, from getting into
25 discussing the meaning of land disposal, the

1 regulations regarding land disposal, or any
2 policies addressing that. This -- now is being
3 asked about the regulations regarding land
4 disposal, which you specifically told us we were
5 prohibited from bringing up when our experts
6 testified. And in fact, when we attempted to
7 mention the registry regarding land disposal,
8 defense claimed that it was excluded by your order.
9 Now defense is asking this witness the same thing,
10 the same issue about describing what land disposal
11 is by -- through their regulations or policies,
12 which you have already indicated you've decided
13 there is a definition of and we're not supposed to
14 be having our experts speak about.

15 THE COURT: Mr. Linsin.

16 MR. LINSIN: Your Honor, the question I've
17 asked does not in any way go to any policies or
18 guidance documents or federal register notices.
19 The question I'm asking and the answer I'm
20 anticipating relate to a set of RCRA regulations
21 that were enacted in 1988 regarding land disposal
22 issues. It is -- these are important, your Honor,
23 in a number of regards, not because I'm going to
24 get into any of these regulations in any way that
25 contradicts or is different from the Court's

1 definition of this term. The witness fully
2 understands those limitations.

3 These are regulations that were enacted the
4 year before DEC's first RCRA compliance inspection
5 at this facility, and having those as a backdrop to
6 understand the significance of that first DEC RCRA
7 compliance inspection we believe is an important
8 aspect of interpreting and helping the jury to
9 understand just what issues were in play at the
10 time of this 1989 inspection.

11 So my question about these regulations is not
12 in any way designed to controvert or dispute the
13 controlling definition of land disposal. It is
14 simply to put -- clarify for the jury that there
15 were these new set of regulations enacted in 1988,
16 and it is relevant to their assessment of the
17 significance of this DEC RCRA compliance
18 inspection. That is why I have asked this and why
19 we believe it relevant.

20 THE COURT: So where are you going with
21 the follow-up questions to the issue of the
22 amendments that relate to land disposal?

23 MR. LINSIN: The only place I'm going at
24 this point, your Honor, is were there regulations
25 enacted, what do they relate to. They related to

1 restrictions on land disposal of, at that time,
2 waste material. And that's it.

3 THE COURT: No follow-up questioning on
4 that?

5 MR. LINSIN: No, not at all.

6 MR. PIAGGIONE: Your Honor, first of all,
7 the RCRA inspection was a small-quantity exemption
8 inspection. Had nothing to do with land disposal
9 or the issuance of land disposal regulations, and
10 there's no indication that there is. There is no
11 indication that there was. They didn't -- in fact,
12 they went through looking at containers, what
13 was -- if you looked at the checklist, it had a lot
14 of things covered by it, not land disposal
15 specifically.

16 So the idea that this inspection was generated
17 by a land disposal regulation that was passed in
18 1988 is totally unsupported by anything that's in
19 evidence. If you look at the inspection itself, it
20 covers a myriad of things, nothing to do with land
21 disposal.

22 Second of all, he is now attempting to put some
23 sort of context for land disposal beyond the
24 definition, of trying to explain away, in effect,
25 what land disposal means by introducing these other

1 regulations. If that's the case, then, your Honor,
2 we should be allowed to put on an expert to explain
3 what, in fact, land disposal means. If they're
4 going to give some sort of other context to it,
5 then that's going beyond the scope of what you've
6 ordered in this case, and it -- it goes to the
7 heart of the very fact that we have not put our
8 experts on to talk about the fact that land
9 disposal is -- how it's used in terms of recycling.

10 THE COURT: Well, as I understand where
11 we're going, the land disposal definition is what
12 I'm presenting to the jury. All we're establishing
13 is that there are amendments that were enacted with
14 respect to land disposal. Period. No follow-up.

15 MR. PIAGGIONE: But if he's going to
16 explain what those regulations are, then he's
17 putting some sort of spin or --

18 MR. LINSIN: I did not --

19 MR. PIAGGIONE: If he's going to ask what
20 it says in those regulations --

21 MR. LINSIN: That is not what I intend to
22 ask. Merely that they generally address
23 restrictions on land disposal. That's it. I'm not
24 getting into the substance of those. I'm not
25 citing them at all. But these were significant

1 regulations, and we believe it is relevant for the
2 jury to understand this in assessing what this DEC
3 inspector did in 1989.

4 THE COURT: Let me ask you this. What
5 does the jury gain by that information if there's
6 no follow-up to what the amendments were and how
7 they relate, if at all, to the issue of waste
8 disposal, which you can't get into?

9 MR. LINSIN: It is in this way, your
10 Honor. The 1989 inspection occurred before the
11 enactment of this 261.4A10, this exemption that
12 specifically related to recycling of K087 without
13 plant disposal. The point is that even though that
14 particular exemption was enacted at a later point
15 in time, when the regulator went out there to
16 assess this recycling activity, there were in fact
17 other regulations that related to -- in the same
18 way, if you will, related to restrictions on land
19 disposal --

20 THE COURT: In the amendments?

21 MR. LINSIN: The 1988 amendments, yes.
22 And so the point is, even though 261.4A10 was later
23 enacted, this issue of restrictions on land
24 disposal for the purposes of RCRA were still in
25 play and were an issue that would have been

1 considered by a RCRA regulator when they are first
2 inspecting a facility and assessing whether -- this
3 is a first visit -- whether this facility is in
4 fact a large-quantity generator or small-quantity
5 generator.

6 We believe it is relevant for that purpose even
7 without -- and I have no intention whatsoever of
8 getting through the details of what those
9 regulations require, restricted, and in no way
10 conflicting with the Court's definition of that
11 term. This is simply background information to
12 understand the context of ensuing regulatory
13 contact with this facility.

14 THE COURT: Yeah, but if the jury doesn't
15 hear evidence with respect to what those amendments
16 in point of fact are, you're asking them to infer
17 something from the fact that there are these
18 amendments, without any information from which they
19 can intelligently draw a reasonable inference.

20 MR. LINSIN: Your Honor, the jury can be
21 instructed, and we have no problem at all with the
22 jury being instructed that they should presume that
23 the definition of land disposal with respect to
24 these regulations is precisely the same as the
25 Court's definition of land disposal. We are not --

1 the term is a term that is used in a number of
2 places in the regulations. The fact that it has
3 been now defined by the Court for the purposes of
4 this case doesn't mean we shouldn't be able to make
5 reference to other places in the regulations where
6 that term is utilized.

7 THE COURT: But those terms don't change
8 the fact of what the definition of waste disposal
9 is, right?

10 MR. LINSIN: The Court's definition of
11 land disposal can readily be used by the jury, and
12 we have no objection to its use here with respect
13 to understanding how land disposal should be used
14 in reference to these land disposal regulations
15 enacted four years prior to 261.4A10.

16 MR. PIAGGIONE: Your Honor, first of all,
17 the understanding that -- or rather the proposal
18 that this is going to be used as motivation for the
19 RCRA inspector is something that is not in
20 evidence, and, in fact, the supervisor of the
21 inspector was on the stand and did not indicate
22 that this was the motivation for having this
23 inspection conducted. That's to begin with.

24 Second of all, the issue about introducing
25 these definitions clearly is an attempt to imply an

1 inference or a context to the definition of land
2 disposal that the jury is going to have to
3 basically -- or given an inference that the land
4 disposal definition should not be applied here
5 because of some sort of other context, in which
6 case then the issue about guidance through the
7 regulatory interpretations by the policies by the
8 agency, which clearly indicate how land disposal
9 should be used, are being excluded by this
10 inference of some other definitions out there about
11 land disposal, and the context of that not being
12 applied here is being introduced. It's going to
13 mislead the jury, to begin with, and confuse the
14 jury.

15 THE COURT: Are you --

16 MR. MANGO: And it's irrelevant.

17 THE COURT: Are you looking to use the
18 amendments as, arguably, the impetus for the
19 activities of the additional inspections of the
20 plant?

21 MR. LINSIN: Your Honor, I wouldn't
22 describe it as the impetus. What my point is and
23 what this witness will testify to when we get to
24 this topic, is that --

25 THE COURT: Okay. I'm sorry. Let's do

1 that. Okay?

2 (End of side bar.)

3 THE COURT: If you twist my arm we'll give
4 you a break. What do you think? You want 15
5 minutes? Okay. And then we can -- might be a
6 little bit longer until I get this resolved. Okay?

7 So don't discuss the case. We'll see you
8 roughly 15-plus minutes, okay? Thank you.

9 (The jury excused from the courtroom.)

10 THE COURT: Okay. Probably what I think
11 we should do is, Miss Williams, have you step out.
12 Okay. You can take a break as well.

13 (Witness left the courtroom.)

14 THE COURT: Please have a seat. I'm
15 sorry.

16 Okay. You were going to say -- I think we were
17 at the point of whether the amendments were the
18 impetus for the subsequent inspection that took
19 place at TCC.

20 MR. LINSIN: Yes, your Honor. In order to
21 assess what these RCRA compliance inspections
22 meant, what they -- what their significance should
23 be for the jury to interpret them, we think it's
24 reasonable for the jury to understand what the
25 background was before the inspections were

1 conducted. That's why we have asked questions of
2 witnesses about this being the very first RCRA
3 inspection of this facility. That's why we have
4 introduced evidence that the facility noticed EPA
5 that it was a generator of K087. That -- and
6 therefore, having a -- it is reasonable for the
7 jury -- and we think it would be unfair for the
8 jury and a distortion for the jury not to
9 understand that the year prior to this inspection
10 occurring there were land disposal restrictions
11 enacted by EPA, so that it is reasonable for a jury
12 to understand that among the things this inspector
13 would have in his mind when he visits the facility
14 is ensuring that the facility is in compliance with
15 the regulations that were then in effect.

16 THE COURT: So the amendments you
17 characterize as amendments that imposed further
18 restrictions.

19 MR. LINSIN: That's exactly correct. On
20 land disposal. And, your Honor, this is not in any
21 way meant, as counsel suggested when we were
22 speaking at the bench, as some end run around or
23 some alternative interpretation of this term. It
24 is simply a recognition of the fact, your Honor.

25 The Court has defined land disposal, and we

1 respect it, and we'll abide by it. But land
2 disposal -- 261.4A10 is not the only place where
3 this term appears in the RCRA regulations. The
4 concept of land disposal and restrictions against
5 land disposal were not first introduced when that
6 exemption was adopted in 1992. This land disposal
7 limitation was in play before then.

8 And simply permitting the jury to have an
9 understanding of that context, applying, as I said
10 previously, precisely the same definition which we
11 recognize and understand that the Court has defined
12 for this case, it is simply an appropriate context
13 for the jury to understand in assessing the meaning
14 of this first RCRA compliance inspection.

15 THE COURT: Well, you know, given what
16 you've just stated, are you in any way prejudiced
17 if the jury is not aware of the fact that there
18 were certain amendments that you say restricted
19 land disposal, if they don't know what those
20 amendments are?

21 MR. LINSIN: Your Honor, if they don't
22 know that those amendments existed, if they don't
23 know that the year before this first DEC RCRA
24 inspection these amendments were on the books, yes,
25 we do believe we are prejudiced, and we believe it

1 would impair the jury from understanding one of the
2 factors that should be considered in assessing the
3 significance of this RCRA compliance inspection and
4 its conclusions.

5 THE COURT: Okay. Mr. Piaggione.

6 MR. PIAGGIONE: Again, your Honor, again
7 the supervisor for the inspectors was on the stand.
8 He did not indicate that this new legislation that
9 he claims motivated this inspection was the reason
10 why they went there.

11 In addition, we had the inspectors who did take
12 the stand who said that was not one of the
13 motivations for them to do an inspection there. It
14 is unfair --

15 THE COURT: Who said that?

16 MR. PIAGGIONE: Mr. Corbett, your Honor.
17 He testified that he went there. He did not
18 indicate he was going there to see -- this first --
19 his two inspections prior to June of 2009, he
20 indicated he went there as part of his
21 inspection -- inspection responsibilities, not
22 related to anything to do with land disposal, with
23 regard to the recycling of any waste. He went
24 there as part of the routine of a small-quantity
25 generator inspection.

1 THE COURT: Yeah, but he didn't say he was
2 not aware of the amendments.

3 MR. PIAGGIONE: But he would always have
4 to be aware of the amendments, your Honor. That's
5 not the motivation for doing the inspection, which
6 is what the implication he's trying to claim is.

7 THE COURT: I don't think so. I don't
8 think you're saying that that was -- and he said
9 outright that's not what he's going to argue, that
10 that was the motivation. I mean, it is the
11 information that the inspectors had when they
12 conducted the investigation, and it -- it does tend
13 to relate to what they would be looking for with
14 respect to how land disposal is defined.

15 MR. LINSIN: Your Honor --

16 MR. PIAGGIONE: However, your Honor --

17 THE COURT: Wait. No. Hold on. Correct?

18 MR. LINSIN: We agree entirely. The
19 government has chosen not to -- to call Mr. Fisher.
20 We are aware of that, and we are not -- but it is
21 now the jury's duty to assess and evaluate the
22 significance of this -- the RCRA compliance
23 inspections, especially in light of what we
24 anticipate will be the Court's instruction
25 regarding entrapment by estoppel in this case.

1 And we believe in order to make that evaluation
2 it is fair, reasonable, and not in any way contrary
3 to the guidance the Court has issued, for the jury
4 to have an understanding of what the regulatory
5 compliance requirements were when this RCRA
6 inspector first visited the facility in 1989.

7 We are not disputing Mr. Corbett's testimony.
8 We have our own issues about his visit to the
9 facility, and we will address those separately.
10 But especially given this 1989 inspection, your
11 Honor, which was prior to the enactment of
12 261.4A10, prior to the construction of a concrete
13 pad, we believe it's important for the jury to
14 recognize that land disposal -- there was a major
15 set of regulations that was adopted nationally, and
16 it would have been -- we believe it's reasonable
17 for the jury to infer -- would have been one of the
18 factors on this regulator's mind when he's going
19 for the very first RCRA compliance inspection.

20 MR. PIAGGIONE: Again, your Honor, if I
21 could be heard. The indictment starts in 1989
22 [sic]. That's when the RCRA charge starts. It
23 seems to me, first of all, that it's irrelevant
24 whether or not what happened in 1989, the
25 inspection, has to do with 1998 forward. That's

1 one thing, that this is totally irrelevant to that
2 issue.

3 Second of all, again, there's been no
4 indication from his supervisor, who was there in
5 1989, that motivation for any type of inspection
6 like this was because of these regulations. And I
7 believe what happens then is the jury gets this
8 basically unfair inference that there's some sort
9 of qualification to what the land disposal
10 definition is.

11 THE COURT: Well, it relates to land
12 disposal, so no matter how you look at it, whatever
13 the amendments are, they modify land disposal. You
14 know, whether -- you know, it's not going to affect
15 the definition that I give.

16 MR. PIAGGIONE: But if that's the case,
17 your Honor, are we permitted then to bring in
18 information as to other contexts for which the use
19 of land disposal is? Are we allowed to then to
20 refer to the policies in which it puts the context
21 of land in, the guidance? Those are the things you
22 specifically told us we could not do.

23 THE COURT: No. We're not talking about
24 that. All right. I'll tell you what. Just hang
25 in for like five minutes.

1 Andrew, can I see you for a second? And then
2 we'll take a break and give Michelle a break. But
3 just wait for a minute.

4 (Judge left the bench.)

5 THE COURT: Okay. Please have a seat.
6 All right. I'm trying to get a context for this,
7 because clearly it's established, Mr. Linsin, that
8 you're not going to do follow-up with respect to
9 what specifically those amendments consisted of.
10 Fair statement?

11 MR. LINSIN: Fair statement, your Honor.

12 THE COURT: All right. Now, what I'm
13 trying to do -- did I cut you off? Go ahead.

14 MR. LINSIN: No. I was really just going
15 to reiterate a general statement that they existed
16 and placed restrictions for the management of the
17 waste on land. That -- that is what I'm
18 anticipating the witness will say in response to
19 the last question, to which there was an objection.

20 THE COURT: All right. And, you know, I'm
21 still struggling with the issue of how that's
22 really relevant without having the specifics of
23 what those amendments were other than that they
24 were restrictive amendments. Now, let me just
25 carry that through, and then I'll let you say what

1 you want.

2 But is -- is the relevance tied into the fact
3 that there's fluidity to RCRA from the standpoint
4 of compliance by Tonawanda Coke in terms of
5 adjusting to what has to be done to comply with
6 RCRA, because RCRA's a changing law? Is that what
7 we're talking about?

8 MR. LINSIN: No. Your Honor, the
9 relevance here for this particular question and a
10 couple of subsequent questions really more relates
11 to this witness's opinions regarding the
12 significance of the findings that were made by
13 these DEC regulators during the course of their
14 inspection reports. She has reviewed those
15 reports. She has opinions to render regarding what
16 those reports mean, what the significance of those
17 findings would reasonably have been.

18 THE COURT: Because of the amendments?

19 MR. LINSIN: In part because of the -- one
20 of the factors, one of the backdrops to this first
21 '89 inspection were these land disposal
22 restrictions, a significant set of RCRA limiting
23 regulations relating to land disposal the year
24 before the inspection occurred.

25 The -- but also, your Honor, I think it is

1 understandable -- it's reasonable for the jury to
2 understand that -- that as early as '88 there was
3 continuity in this concept of land disposal in
4 different places in the regulations. The '92
5 adoption of 261.4A10 wasn't this -- the first time
6 this issue of land disposal or prohibitions against
7 land disposal related to RCRA.

8 THE COURT: Well, there was consistency,
9 arguably, okay. That's a fair argument, I suppose.
10 But then that consistency being interrupted by the
11 amendments, is that where we are going?

12 MR. LINSIN: No. No, your Honor. Our
13 position is there was never land disposal in the
14 re-treatment and reuse of this material. Never
15 was. And the point is, in drawing this concept
16 back, the explicit prohibition regarding land
17 disposal back to at least 1988 is that it predated
18 the very beginning of the regulatory oversight of
19 this facility by DEC.

20 And we think that's a fair factor for the jury
21 to understand, in general senses -- in a general
22 sense, with respect to interpreting what this
23 regulatory oversight meant, what it related to.

24 THE COURT: Let me ask you this. Let
25 me -- you know, in general terms, in general

1 oversight, you know, all of that still factors into
2 the opinion that you're going to ask your witness
3 to render. But my question is, what happens if the
4 jurors ask the question, "What did those amendments
5 consist of?" Then what do we do?

6 MR. LINSIN: Your Honor, I would be happy
7 to instruct the witness -- I have not expressly
8 instructed her in this way, but I will do so, that
9 anything she might say in response to a question
10 like that would have to presume that the
11 limitations related were -- were defined as the
12 Court has defined land disposal with respect to
13 this particular case, and not go into any great
14 detail otherwise. That these were a set of
15 regulations that prevented the land disposal -- the
16 management of wastes on the land.

17 And I will tell you, your Honor, these are
18 regulations that were in development during the
19 time this witness was the head of the Office of
20 Solid Waste. I mean, this is a -- something she
21 does have knowledge about. It is -- she
22 understands entirely that we're working within
23 the -- this framework, but we -- we do not -- we
24 would not invite, we are not intending to get into
25 any detail at all about these regulations and

1 precisely what they related to. It is simply that
2 this issue of land disposal is -- is a -- a factor
3 for the regulatory oversight for this facility, and
4 it's reasonable for the jury to understand that.

5 THE COURT: Yeah, but what's a little bit
6 troubling to me is that on your description of what
7 her knowledge is, I mean, it's not only with
8 respect to the amendments, but it's the development
9 of the amendments prior to their enactment that she
10 would be basing her opinion on with respect to the
11 conclusions of the investigators.

12 MR. LINSIN: Your Honor, the opinion she's
13 based -- the basis upon which her opinion is
14 rendered is simply a recognition that these land
15 disposal restrictions had been promulgated. And
16 that is it. The land disposal restrictions, your
17 Honor, have the -- with respect to the activities
18 at Tonawanda Coke, have the precise same
19 limitations as 261.4A10 do. And she's not going to
20 render any different opinion about that. The land
21 disposal restrictions were not industry specific.

22 THE COURT: So there's no difference
23 between those amendments and 261.410?

24 MR. LINSIN: With respect to land
25 disposal, yes.

1 THE COURT: In terms of the restrictions.

2 MR. LINSIN: That's correct.

3 THE COURT: So, whether they existed or
4 not makes no difference, because 261.410 --

5 MR. LINSIN: Well, your Honor, I beg to
6 differ. I think it does.

7 THE COURT: I'm not telling you. It was
8 actually a question.

9 MR. LINSIN: With respect to understanding
10 the context of this 1989 inspection, your Honor, we
11 think it does make a difference, because --

12 THE COURT: But she has to have -- I'm
13 sorry. She has to have knowledge of what those
14 amendments consisted of, what they were, in order
15 for her to consider them in whatever opinion you're
16 going to ask her to render, right?

17 MR. LINSIN: But, your Honor, it is -- it
18 is the knowledge she has of any of the RCRA
19 regulations that she has already testified about.
20 And her testimony will simply be that these
21 restrictions prohibited generators from managing
22 the solid or hazardous waste on the ground until
23 they met certain treatment standards. That is her
24 only -- that is the only point of this, but a
25 recognition that -- here is the dilemma we are

1 facing, your Honor.

2 THE COURT: All right. And this is
3 against the backdrop of the definition of land
4 disposal?

5 MR. LINSIN: All of this is strictly
6 within those confines. But imagine a situation
7 where we -- we believe it's reasonable, and we
8 believe it will be reasonable for the jury to infer
9 that this very first RCRA inspection by DEC
10 evaluated this activity. Obviously, that is a
11 point of discussion here.

12 THE COURT: This activity meaning --

13 MR. LINSIN: Meaning the recycling of the
14 K087 at the facility at a time before there was any
15 concrete pad. If we are not able to provide this
16 backdrop regarding what the DEC regulators were
17 reasonably looking at, we will have the testimony
18 then that 261.4A10 that specifically addressed this
19 K087 and wove in this exemption with the exception
20 of land disposal, that first RCRA inspector
21 couldn't have even been thinking about this issue
22 of land disposal, because 261.4A10 was not even
23 enacted until 1992, three years after the
24 inspection.

25 But the reality is that these regulations were

1 on the books, these more general regulations
2 prohibiting the precise same activity that we're
3 talking about in detail in 261.410A.

4 THE COURT: So 261.4A10 were enacted after
5 the amendments to RCRA, the general amendments that
6 you're talking about?

7 MR. LINSIN: Yes. 261.4A10 was enacted in
8 1992. If she has not already -- there has already
9 been testimony to that effect, and that is the
10 reality. So they were enacted three years prior to
11 this RCRA inspection that I've been referencing in
12 '89. But the land disposal restrictions, which
13 conveyed the same limitations, generally, for
14 industry, were enacted the year before the '89
15 inspection.

16 THE COURT: Well, okay. Is that relevant
17 to your client in any way?

18 MR. LINSIN: Well, your Honor, we believe
19 it is important -- for my client's purposes it is
20 relevant to understand what the jury should take
21 away from the findings of this first RCRA
22 inspection and, therefore, what my client should
23 understand and rely upon, given this first RCRA
24 inspection in '89.

25 THE COURT: Okay. And the specific

1 findings?

2 MR. LINSIN: That there was no disposal
3 occurring, there was no treatment occurring, and no
4 disposal, treatment, or storage of this waste. All
5 of those findings we've walked through in detail
6 with several witnesses. The inspection report is
7 in the record.

8 And without understanding what this regulator
9 was reasonably looking for with regard to the
10 disposal issue, and that being the backdrop of
11 these land disposal restrictions, my client is
12 prejudiced in not being able to clarify to the jury
13 that this was one of the factors that would have
14 influenced those findings. The same prohibition
15 against land disposals that is then embodied in
16 261.4A10 three years later.

17 THE COURT: Okay. All right.

18 MR. MANGO: Judge, if I can, I'm about to
19 jump out of my skin. I'm sorry.

20 The land disposal that's part of 261.4A10 is
21 very different than the land disposal we're talking
22 about in these 1988 amendments. The 1988
23 amendments dealt with, as Mr. Linsin just said,
24 managing hazardous wastes to a treatment standard
25 so that it can be applied to the ground and left

1 there. And left there. That's her understanding
2 of what she's going to talk about these 1988
3 amendments.

4 THE COURT: Well, she already made
5 reference to that, didn't she, in her testimony?

6 MR. MANGO: Not -- not with -- not with
7 specific specificity to these 1988 amendments. The
8 problem is 261.4A10, the exclusion for K087 waste
9 that talks about land disposal, it's in a different
10 context. And it's the 1992 regulation that comes
11 out that gives context to the definition the Court
12 has now included, which says you can't put it on
13 the land. That's very different than the 1988
14 amendments, which say, well, you can put it on the
15 land if you treat it to a certain level.

16 That's -- that's where he's trying to go with
17 this, with all due respect. That's -- so it is
18 going to create some confusion, and it is still
19 going to create confusion in the jurors' minds
20 and --

21 THE COURT: It is confusing, though, isn't
22 it? Doesn't this help rather than confuse?

23 MR. MANGO: The government disagrees that
24 it helps. But if -- if it is inquired to, at some
25 point the government's going to need to then add

1 the context for what land disposal actually means
2 according to the Court's definition, which is
3 something totally different than the 1988
4 amendments.

5 THE COURT: But my definition is not going
6 to change any. That's the law of the case. So you
7 can argue from that. Right?

8 MR. MANGO: That's correct, your Honor.
9 The 1992 amendments is what gives really the
10 creation of your -- of your definition, not these
11 more general 1988 amendments.

12 THE COURT: But they're consistent, are
13 they not? I mean -- and that's part of the
14 argument, that we're talking about consistency
15 here, getting -- I'm sorry. Go ahead.

16 MR. MANGO: I'm sorry. I cut you off.

17 THE COURT: No, no. No.

18 MR. MANGO: Well, the 1988 amendments deal
19 with treatment of the material and then leaving it
20 on the ground. Leaving it there. In the -- in the
21 true sense of abandoning it on the ground. You
22 have to --

23 THE COURT: But it had to be part of the
24 process, right? I mean, you couldn't leave it
25 there and store it there. It had to be part of

1 that recycling process.

2 MR. MANGO: No. In the 1988 amendments,
3 it is if you treat a material to a certain -- like
4 if you reduce the toxicity level of it to an
5 additional -- or to a lower amount, then you can
6 dispose of it on the land. You can put it on the
7 land, bury it over, leave it there.

8 THE COURT: Well, let me ask you, are we
9 talking disposal --

10 MR. LINSIN: Your Honor, Count 19 charges
11 my client with disposal of K087. But my intention
12 and my limited intention, as I've explained to the
13 Court several times, in referencing --

14 THE COURT: Well, you know, I'm a little
15 bit on the thick side.

16 MR. LINSIN: No. I'm trying, actually, to
17 explain it to Mr. Mango.

18 THE COURT: I get the drift of what you're
19 saying, but -- yeah, go ahead.

20 MR. LINSIN: You know, this is not being
21 brought up somehow to argue and it is not our
22 position in any way that Tonawanda Coke disposed of
23 this material and left it on the ground. That is
24 not our point at all. And the point of the 1988
25 general amendments was that there can be no land

1 disposal unless some of these treatment issues were
2 addressed. And it is the land -- the prohibition
3 against land disposal of hazardous waste that is
4 the continuing thread between the 1988 amendments,
5 the land disposal restrictions, and this embodiment
6 of the prohibition against land disposal in the '92
7 amendment -- '92 regulation.

8 MR. MANGO: But that's very different than
9 the Court's now definition and what the 1992
10 amendments say, which say absolutely no land
11 disposal regardless of how you treat it. K087
12 waste cannot go on the ground. So this is going to
13 confuse the issue, because these 1988 amendments
14 talk about, well, it can go on the ground if you
15 treat it to a certain thing. It's like talking
16 about apples and oranges here, your Honor.

17 THE COURT: All right. Let's take a break
18 for 15 minutes, and we'll start again at about 10
19 of 12:00.

20 (Short recess was taken.)

21 (Jury not present in the courtroom.)

22 THE COURT: Okay. The attorneys and
23 parties are back present. I've reviewed the
24 arguments of the attorneys concerning the relevancy
25 of the 1988 amendments to RCRA that we had

1 discussed before the break, and the defendants have
2 expressed that the changes to RCRA in and around
3 the 1989 inspection at the Tonawanda Coke Company,
4 specifically the 1988 amendments and the 1992
5 regulations, are relevant to witness Marcia
6 Williams's opinions concerning the significance of
7 the New York DEC regulators' findings as set forth
8 in their report from the 1989 inspection.

9 Williams's opinion is allegedly based in part,
10 or at least will be, on her recognition that the
11 1989 restrictions had been promulgated on the
12 disposal of waste on land.

13 Having reviewed these arguments, I find that
14 this evidence is relevant in the sense that it goes
15 to the bases of Williams's opinions, but I further
16 find that the probative value of this evidence is
17 substantially outweighed by the danger of confusing
18 or misleading the jury.

19 In particular, the risk is present because the
20 jury will not be presented with a full context or
21 explanation of the specific RCRA amendments and the
22 changes at issue. Moreover, there is the risk that
23 the witness, even if instructed, could sua sponte
24 testify substantively about the regulations or that
25 her testimony will cause the jurors to question the

1 substance of the regulations.

2 In my view, this evidence is not required for
3 the jury to understand the basis of Williams's
4 opinions, and I find no prejudice to defendants of
5 substance in excluding this line of questioning
6 under Rule 403. That is my ruling.

7 Before we begin, Chris, could I see you just
8 for a minute?

9 COURT SECURITY OFFICER: Yes, sir.

10 THE COURT: Okay. I have one other
11 matter. I'd like the attorneys to approach the
12 bench.

13 (Side bar discussion held on the record.)

14 THE COURT: Okay. I did receive what I
15 would describe as a communication from the jury,
16 and the way it materialized, as the jury left for
17 the break and entered into the deliberation room,
18 they expressed to the court security officer that
19 they had difficulty in understanding the testimony
20 of the expert witness, and could he ask me, the
21 judge, to see if the testimony from the witness
22 could be dumbed down a bit.

23 So I offer that to you, as the communication.
24 My sense is they should be, in the normal course --
25 and I don't -- I'm just going to offer to you what

1 I think, and then you can comment. I'm reluctant
2 to make that an issue as far as the jury is
3 concerned and its relationship with the court
4 security officer, because he does follow my
5 instructions to the letter in not having
6 communications with the jury. That was a blurt-out
7 reaction of the jury.

8 And what I don't want to do is create a divide
9 between the CSO and the jurors. I think that
10 relationship is important, especially in a case
11 like this. So what I propose is that we do not
12 much of anything, other than when we do recess for
13 the -- for the morning, afternoon, that I just tell
14 them again, please -- not make an issue of it -- do
15 not discuss the case. Do not communicate with
16 anybody. Just the same, in essence, litany that I
17 normally give to the jurors, and then go on.

18 MR. LINSIN: We would have no objection to
19 that, your Honor.

20 MR. PIAGGIONE: No objection.

21 MR. LINSIN: And I would only indicate
22 that even our assessment of how this testimony had
23 gone so far, my intention with the witness right
24 now is to use actually a graphic she had prepared
25 to illustrate some of this. I will not be,

1 obviously, making reference to this, but in --
2 hopefully in clarifying some of these concepts with
3 the graphic, that might help the jury, and then we
4 will just move on.

5 THE COURT: Okay. I mean, each side has
6 to determine how they want to handle subsequent
7 testimony. In my judgment, if there are objections
8 that something was asked and answered, that's
9 legitimate in going forward. If your
10 clarifications are the result of the exhibits that
11 you intend to introduce and have the witness
12 testify from, that works.

13 MR. LINSIN: It is simply an exhibit that
14 summarizes all of this testimony about solid waste,
15 the -- and the reasons things might not meet that
16 definition, and then what happens if it does.

17 THE COURT: Okay.

18 MR. LINSIN: It is a summary chart, which
19 we've already provided to the government.

20 MR. MANGO: Which we may want to just
21 discuss now.

22 MR. LINSIN: Go ahead.

23 MR. MANGO: Your Honor, we have no
24 objection to the use of these charts as pedagogical
25 exhibits for the witness's -- for the witness and

1 for the jury's benefit, but I think under
2 Rule 611(a) they really are just pedagogical -- I'm
3 having trouble with that one -- exhibits and not to
4 be admitted into evidence. I think a number of
5 circuits have said that the better practice for
6 these type of exhibits is you can use them, but
7 because they, in essence, summarize the law, of
8 what the law is under RCRA, which will be in your
9 jury instructions, that they should not be -- and
10 we didn't get a chance to discuss this, so I don't
11 know if counsel is planning to introduce these as
12 substantive evidence in the case, but I would just
13 note our position at this point, your Honor.

14 MR. LINSIN: Well, our view is, your
15 Honor, that the exhibit is intended to summarize
16 her testimony. We think it would be of assistance
17 to the jury to be able to make reference to it. We
18 would move it, and if counsel wishes to object,
19 obviously the Court can make a judgment after
20 seeing it. But it is no more an expression of the
21 law than the testimony of the government's
22 witnesses on the law on this point, so I --

23 THE COURT: I'll have to wait and see. If
24 you were finished. I didn't mean to cut you off.

25 MR. LINSIN: Okay.

1 THE COURT: I'll wait and see. I
2 understand the respective positions, and we'll
3 proceed on that basis. Okay.

4 I'm just wondering if that makes more sense to
5 break for lunch.

6 MR. LINSIN: I'm certainly not going to be
7 done in a half hour, so that would be fine and
8 might be easier from a sense of continuity.

9 THE COURT: Okay. Now, how does that
10 affect your witness that you have?

11 MR. PERSONIUS: The fireman?

12 THE COURT: Yeah.

13 MR. PERSONIUS: He was going to come,
14 Judge, at 1:45. He -- he has somewhere he has to
15 be by 5 o'clock. I could have him come later in
16 the afternoon.

17 I know it's not a fair question, Rocky, but do
18 you have any sense how long your cross will be?

19 MR. PIAGGIONE: I don't think it's going
20 to be that long, but if you want to put him on out
21 of order, maybe?

22 MR. MANGO: I don't know if that would
23 make sense, with the confusion the jury already
24 has, to --

25 THE COURT: Wait. Michelle's transcribing

1 your dialogue there, and you're talking over each
2 other.

3 MR. PIAGGIONE: I'm sorry.

4 THE COURT: You know, if you put that
5 witness on, the expert will have to come back
6 probably on Monday.

7 MR. PERSONIUS: Right. And that won't
8 work, because she is from California.

9 This witness, Judge, from our initial meeting
10 with him, the fireman, I had understood was leaving
11 for Florida this weekend. When I talked to him
12 about his availability, he said he's not available
13 tomorrow, which is fine. My understanding is he
14 would be available Monday if we needed -- if we
15 needed him on Monday. We would love to get
16 everything wrapped up today, but I think that's an
17 option. And I can check over the break. I'll call
18 him back.

19 THE COURT: All right. Yeah, check on
20 that, because, I mean, that would obviate the
21 problem, I think.

22 MR. PERSONIUS: Yes. And I think it is
23 better. There might be something to what Aaron
24 says about completing this testimony. I think
25 you're probably right.

1 MR. MANGO: It makes sense.

2 THE COURT: Okay. Does that work for
3 everybody?

4 MR. PIAGGIONE: Yes, your Honor. I was
5 just making a suggestion to accommodate.

6 THE COURT: No, that's fine.

7 MR. PERSONIUS: It was understood that
8 way.

9 THE COURT: Okay. Want to start at 1:45?
10 That way it helps a little bit to try to get the
11 witness wrapped up by today.

12 MR. PERSONIUS: Okay.

13 MR. PIAGGIONE: Thank you, your Honor.

14 MR. LINSIN: Thank you, Judge.

15 (End of side bar discussion.)

16 THE COURT: Okay. You have my decision
17 with respect to the line of questioning that we've
18 discussed as far as the expert witness is
19 concerned. I think we've also addressed to some
20 extent the order of witnesses that still need to be
21 called. I think to be most efficient and allow
22 time to contact one of your witnesses,
23 Mr. Personius, and to get everything ready for
24 efficient resumption of testimony, we'll let the
25 jury go now until 1:45 and start promptly,

1 hopefully, at that time with Miss Williams's
2 continued testimony on direct examination.

3 Does that meet with the defense approval,
4 Mr. Linsin?

5 MR. LINSIN: It is acceptable to us, your
6 Honor.

7 THE COURT: All right. Mr. Personius?

8 MR. PERSONIUS: Yes. Thank you, your
9 Honor.

10 THE COURT: And from the government's
11 standpoint?

12 MR. MANGO: Yes, your Honor.

13 THE COURT: Okay. Chris, if you would
14 bring the jury in, please.

15 (Jury seated.)

16 THE COURT: Okay. Based on my objective
17 observations, it seems to me that you're desperate
18 to take an early lunch break, with the
19 understanding that you show back here at 1:45 for
20 resumption of testimony in the case. That will
21 enable us to get everything in order. We've been
22 working through some matters, and we'd like to
23 resume examination of Miss Williams. So I hope you
24 don't mind if we break a little bit earlier for
25 lunch.

1 Please keep in mind the fact that this is an
2 important case. Don't prejudge it. Keep your
3 minds open. Don't discuss the case. Don't do any
4 independent investigation or communication. You've
5 been terrific. So if you get an early lunch,
6 that's a bonus. We'll have you back here, though,
7 at what time?

8 THE JURY: 1:45.

9 THE COURT: Okay. Thank you very much.

10 (Jury excused from the courtroom.)

11 THE COURT: Okay. We'll try to start at
12 1:45 then. Thank you.

13 MR. LINSIN: Thank you, your Honor.

14 (Lunch recess was taken.)

15 (Jury seated.)

16 THE COURT: Welcome back. Please have a
17 seat. Okay. The attorneys and parties are back
18 present. The jury is here, roll call waived. We
19 hope you had a good lunch. Our witness, Marcia
20 Williams, is back on the stand. She remains on
21 direct examination. I guess, Mr. Linsin, you're
22 going to resume.

23 MR. LINSIN: Yes.

24 THE COURT: And, Miss Williams, you remain
25 under oath.

1 BY MR. LINSIN:

2 Q. Good afternoon, Miss Williams.

3 A. Good afternoon.

4 Q. Miss Williams, in preparation for your
5 testimony here today, did you prepare a chart that
6 summarizes the testimony you've provided regarding
7 the RCRA solid waste definition and the various
8 exclusions and exemptions from that?

9 A. Yes, I did.

10 Q. Miss Henderson, could I please have Defendants'
11 Exhibit 0000 for identification.

12 And do you see on your screen there,
13 Miss Williams, the document that in the lower
14 right-hand corner is marked as Defendants' Exhibit
15 0000?

16 A. Yes, I do.

17 Q. And did you prepare this diagram?

18 A. I did.

19 Q. All right. And does it fairly summarize the
20 testimony I just referenced regarding the RCRA
21 solid waste definition and the exclusions and
22 exemptions?

23 A. Yes.

24 MR. LINSIN: All right. Your Honor, at
25 this time I would ask that Defendants' Exhibit 0000

1 be published for the purposes of illustrating the
2 witness's testimony, but also published -- received
3 substantively into evidence for that reason, as
4 well.

5 MR. PIAGGIONE: Again, your Honor, I
6 believe we discussed this before. There is a
7 limited use for that purpose only as an aid at this
8 point in the court, but not as an exhibit. We
9 believe under 611 this is an indication of the law
10 without any reference to citations and not to be an
11 exhibit introduced into evidence.

12 THE COURT: All right. I'll receive it at
13 this time demonstratively subject to renewed
14 request to have it admitted into evidence pursuant
15 to 1002, I think. And the objection will be noted.
16 It may be published though.

17 MR. LINSIN: All right. May we publish it
18 then at this time?

19 (Defendants' Exhibit 0000 received
20 demonstratively.)

21 BY MR. LINSIN:

22 Q. Miss Williams, would you, first of all, explain
23 to the members of the jury what is depicted in this
24 center white box on this chart that you prepared.

25 A. The center white box is a summary of the

1 definition of solid waste regulations. And it has
2 included in it the types of things that the
3 regulations suggest look like discard. And so just
4 to pick one example, if you look under the heading
5 that says "Recycled in certain ways based on the
6 type of material," you can see, and I'll just make
7 the very first example there.

8 THE COURT: Okay. Put a dot. Tap it with
9 your finger with some authority.

10 THE WITNESS: I sort of got it. So it
11 says, "Listed by-products/sludges when reclaimed."
12 So that's an example of the type of secondary
13 material, a listed by-product or sludge, that if it
14 was recycled by being reclaimed, the regulations
15 say that encompasses discard.

16 BY MR. LINSIN:

17 Q. And would be treated as a solid waste under the
18 RCRA regulations, is that correct?

19 A. Yes, it would.

20 Q. All right. Now, if, after looking at all these
21 factors in the solid waste definition -- if all of
22 the answers to those questions in that central box
23 are in the negative, no, would you please describe
24 then what is depicted on the left-hand side of the
25 diagram?

1 A. The left-hand side of the diagram, where it
2 says "Not a solid waste," are examples of the types
3 of materials and recycling that would not be
4 considered a solid waste under RCRA. So, for
5 example -- if I can get up there -- continuous
6 production process, which is one I talked about
7 this morning, is an example of a type of recycling
8 that would not be considered a solid waste under
9 RCRA.

10 Q. All right. Now -- and you have listed other
11 examples here as well, is that correct?

12 A. I have. I have.

13 Q. Now, if, in reviewing this central definition
14 of solid waste, it is determined that the material
15 fits one of these definitions of solid waste, so
16 you have an affirmative answer, would you describe
17 what that means with respect to the boxes that are
18 on the right-hand side of this diagram.

19 A. So what it means is if you get any -- a yes to
20 any of the answers in the central box, you come
21 over into this gold-colored box on the right-hand
22 side which says -- that means the material is a
23 solid waste under RCRA. And then --

24 Q. And if we stay with the gold-colored box, would
25 you describe then what is depicted up here in this

1 longer rectangular box marked 261.4(a)?

2 A. If the starting point is that it is a solid

3 waste under RCRA -- I think I mentioned this

4 morning there can still be some additional

5 exemptions from the definition of a solid waste.

6 And so if it's a solid waste, in other words, it

7 comes off to the right-hand side of the box, you

8 then check the whole list of exemptions to see if

9 perhaps one of those apply. And if one of those

10 apply, again this arrow brings you back over to the

11 fact that it's not a solid waste.

12 Q. It's not a solid waste and thus not a RCRA

13 waste under the regulations, is that correct?

14 A. That's correct. It's not a RCRA waste.

15 Q. All right. Now, if -- we will speak in a

16 moment about a particular one of these exemptions

17 as you testified earlier that relates to K087. But

18 just to complete this chart, if you've determined

19 the waste is a solid waste and it doesn't meet one

20 of these exemptions, what is the purple-colored box

21 intended to reference here?

22 A. The purple box captures all of the different

23 solid wastes that also meet the definition of a

24 hazardous waste. And so those materials are both

25 solid wastes and hazardous wastes, and if they're

1 treated, stored, or disposed of, would require a
2 RCRA permit.

3 Q. And so even though -- as you testified earlier,
4 even though we have in this case a material that
5 is -- is in the regulations as a listed hazardous
6 waste, this K087, and it's in the regs listed that
7 way, is it your testimony that in order to
8 understand whether or not the RCRA permitting
9 requirements apply to that material, you have to go
10 through the analysis you've just summarized here?

11 A. That's correct. You have to determine whether
12 it's also a solid waste.

13 Q. All right.

14 THE COURT: Why don't you put it in the
15 center box and trace it through.

16 BY MR. LINSIN:

17 Q. Okay. Let us -- if you would, take -- presume
18 we have K087 material and -- and -- which is a
19 listed RCRA hazardous waste, correct?

20 THE COURT: That's your coal tar sludge,
21 right?

22 MR. LINSIN: I'm sorry, your Honor?

23 THE COURT: Coal tar sludge?

24 BY MR. LINSIN:

25 Q. The coal tar sludge from a coking operation.

1 Now, assuming you have that material, please
2 explain to the jury, with reference to the center
3 box, how do you decide whether that coal tar sludge
4 that's sitting in a tar box at the facility,
5 whether it's governed by the RCRA regulation -- the
6 permitting regulations?

7 A. Okay. Well, I have to look and see -- I have
8 to know what I'm going to do with that K087. So
9 I -- in this particular case, the K087 is removed
10 from the tar box, and it's taken over to the coal
11 piles. It's put on the coal piles and mixed with
12 the coal pile. And then it's put back into the
13 coke ovens for the manufacture of coke. So I have
14 to know all those things before I start to go
15 through this center box. So I go through the box
16 and I ask first of all --

17 Q. Tap the box where you're talking about.

18 A. I first ask is that material being abandoned,
19 meaning thrown away. So the answer to that would
20 be no, because it's being recycled by being mixed
21 on the coal piles and put back into the coke oven.
22 Sorry.

23 Q. That's all right.

24 A. Well, anyway, I go down to speculatively
25 accumulated, and what that means is I collect it

1 for a very long time. I might intend to recycle it
2 but I haven't recycled it. I'm storing it and
3 there's some very specific definitions in the
4 regulations as to how long I store it before it
5 gets to be considered speculatively accumulated,
6 but it's a long time. It's over a year. So, in
7 the case that we just described, the K087 wouldn't
8 meet that criteria either.

9 And then I look at this whole set of recycling
10 descriptions that are in the regulations, and I see
11 if it meets any of these. So the first thing I'm
12 looking at is, is it a listed by-product or a
13 listed sludge that's being reclaimed? Now, K087 is
14 a listed by-product. In fact, it is a listed
15 by-product. That's the way it would classify under
16 the regulations. So it meets the first part of
17 that line. But the question is, is it being
18 reclaimed? What reclaimed means is that you're
19 having to first do something with the waste to
20 either remove what's valuable from the waste so you
21 can throw some part of it away, or you remove the
22 part that you want to throw away, so what you have
23 left is good.

24 And in our case there's no reclamation going on
25 in the case of the material, because all the

1 material together is being removed from the tar box
2 and taken over to the coal piles to mix.

3 Q. What about the next item then --

4 A. The spent materials is the next item. This is
5 not -- K087 is not a spent material. A spent
6 material would be something, let's say, like a
7 solvent that you used it, you're finished using it,
8 and so you're done using it. But the K087 doesn't
9 fit that.

10 Q. The next one?

11 A. The next one is used on the land. What that
12 means is the actual use of the material is placed
13 on the land. So the best example I could give you
14 of that is a fertilizer. Many times people take a
15 waste and they say well, I can recycle it, but I'm
16 going to recycle it as at fertilizer. That's use
17 on the land.

18 Q. Okay. And the last one?

19 A. The last one is used to make a fuel -- used to
20 make a fuel or used as a fuel. And the only caveat
21 to that is that it's okay to use it as a fuel to
22 make a fuel if, in fact, that's its normal way it
23 would be used. And so the K087 doesn't meet that
24 either.

25 Q. All right. And in saying that, you understand

1 that the K087 is recycled with the coal and put
2 back into the ovens, correct?

3 A. Yes.

4 Q. All right.

5 A. It is mixed with the normal ordinary feedstock,
6 which is the coal, and then it's put back into the
7 ovens.

8 Q. But it is not burned in the oven as a fuel, is
9 that your point?

10 A. It's not burned in the oven as a fuel. And it
11 is used to make coke. And coke actually can be
12 used as both a fuel and not an important carbon
13 source in the manufacture of steel.

14 Q. All right.

15 A. But in this case, there's already been a
16 determination in the regulations that coke is not a
17 waste-derived fuel.

18 Q. All right. And the last item then working
19 through our K087, what does this stored for
20 abandonment mean?

21 A. Stored for abandonment means that you decided
22 to store it, but your long-term plan for what to do
23 with it is you're going dispose of it.

24 Q. All right. So we will come back to these in --
25 in reference to the particular issues regarding

1 Count 19 in this case, which relates to the K087.

2 And we may come back and make reference to this
3 chart as we do so.

4 And I will actually wait until later to move it
5 substantively. Did the Court have additional
6 questions?

7 THE COURT: Well, are you going to take
8 it -- where does it go, right or left, from the
9 center box?

10 MR. LINSIN: All right.

11 BY MR. LINSIN:

12 Q. In this -- in this summary you've just provided
13 with the K087, if I understood your testimony, your
14 testimony was that based on the facts you
15 understood in this case, the K087, even though it's
16 listed as a hazardous waste, doesn't meet any of
17 these definitions of the solid waste that you
18 summarized, is that correct?

19 A. That is correct.

20 Q. And so show the jury, please, based on your
21 review of the regs, where that material, the K087,
22 fits, given the activity that you understand went
23 on at Tonawanda Coke.

24 A. It's my view that it fits right in that
25 continuous production process line on the left-hand

1 side.

2 Q. All right. So this second bullet here on the
3 left, is that correct?

4 A. Yes. And I think it also fits equally well --
5 I'm not good at this, obviously. I was trying to
6 hit this first one.

7 Q. Are you indicating the --

8 A. It's directly reused as a feedstock. It's
9 directly reused as a feedstock.

10 Q. And so am I understanding correctly that your
11 view is that it -- the material as handled by
12 Tonawanda Coke, this K087, doesn't fit -- you don't
13 get a yes answer to any of these solid waste
14 questions, and it also fits into these categories
15 you've identified as continuous production process
16 and reuse as a feedstock, as -- and so, therefore,
17 is not treated was a solid waste under RCRA?

18 A. Yes, that's my opinion.

19 Q. All right. Now, as long as we're here, let me
20 ask you -- even though that is your opinion, let me
21 ask you to presume for one moment that the K087 at
22 Tonawanda Coke was considered a solid waste for the
23 purposes of this chart. So it gets you over here
24 then to the yes side of this equation. Would you
25 walk the jury through how this 240 -- I'm sorry --

1 261.4(a) exemption would relate to the handling of
2 K087.

3 A. Okay. So, now, if we make that assumption
4 we're in this gold box over here, and it's a solid
5 waste. So we look up here at 261.4(a)(10), which
6 is a particular exemption that was put in for the
7 coke manufacturing industry. And we look to see
8 whether the conditions of that particular exemption
9 are met. And the key provision is that there could
10 be no land disposal associated with the management
11 of the K087 from the point in time that it leaves
12 the tar box until the point in time that it enters
13 the recycling process.

14 Q. All right. And based on your review of the
15 information and testimony in this case, do you have
16 an opinion as to whether or not the K087 that was
17 generated at Tonawanda Coke and handled in the way
18 you described satisfies this exemption that you
19 just identified?

20 MR. PIAGGIONE: Objection, your Honor.
21 Again, if he's going to testify about land
22 disposal, her definition of land disposal has
23 already been defined by the Court.

24 THE COURT: No. I'm going to overrule
25 that objection. You may answer that. Can you

1 answer it, first?

2 THE WITNESS: Yes.

3 BY MR. LINSIN:

4 Q. All right. Would you please explain what your
5 opinion is?

6 A. It's my opinion that the material entered the
7 recycling process at the time it was mixed with the
8 coal on the coal piles in the coalfield. And
9 that's when the recycling started. And so it was
10 not -- it was not land disposed. It met the terms
11 of the exemption.

12 Q. All right. Now, we will come back to this with
13 respect to Count 19 in specific, but --

14 THE COURT: All right. Let me -- let me
15 just interrupt, one more question. Okay?

16 MR. LINSIN: Sure.

17 THE COURT: Go back to the gold box. It
18 says "RCRA solid waste." Well, you follow the line
19 that went up to the exemption. How do you get into
20 the purple box?

21 THE WITNESS: I get into the purple box if
22 there are no exemptions that would cover that
23 particular type of material in recycling. So in
24 our case we -- in our case, let's say we went up to
25 the -- I guess we could draw another line here. It

1 would be maybe clearer. So if we go up to the
2 261.4(a)(10) box and we say, well, there is an
3 exemption here, but we don't meet the conditions of
4 that exemption, then there would be another line
5 that would bring it down to the purple box.

6 THE COURT: Okay. So that was my
7 question. I mean, you didn't have a line getting
8 anything into the purple box, but if you don't meet
9 one of the exemptions in the gold box above, you
10 have to drop down to the purple box, is that right?

11 THE WITNESS: That's correct. Assuming
12 you first get over to the gold box, try to meet the
13 exemption, don't meet the exemption, then you drop
14 it down to the purple box.

15 THE COURT: And you only go from the
16 exemption gold box back to the blue box if an
17 exemption is met?

18 THE WITNESS: That's correct. But you
19 never even get to the right-hand side of the chart
20 at all if you don't -- you know, if you don't -- if
21 you don't have discard the way it's described in
22 the center box, you never get to the right-hand
23 side of the box.

24 THE COURT: Okay. But you assumed that
25 you were able to get to the gold box in order to

1 explain the analysis that you just did.

2 THE WITNESS: Yes, I did.

3 THE COURT: All right. But your view is
4 you don't go in the right direction, you go to the
5 "no" direction because it's not a waste.

6 THE WITNESS: That's correct.

7 MR. LINSIN: All right. Now --

8 MR. PERSONIUS: Excuse me, your Honor. I
9 know this is out of line, but I'm going to mention
10 it as long as we're on the box right now. If you
11 go where the blue box is where it's a not a solid
12 waste, and the witness testified that there were
13 two of those bullet points below that that would
14 apply here, it's not at all clear to me what those
15 are or why they would apply. I could ask it
16 myself, but I thought for continuity maybe we could
17 explain that now?

18 THE COURT: Okay. Yeah. Let's do that.
19 Thank you.

20 MR. LINSIN: Okay. I thought we had
21 covered this previously, but thank you,
22 Mr. Personius.

23 MR. PERSONIUS: We may have.

24 BY MR. LINSIN:

25 Q. On -- on this point, Miss Williams, would

1 you -- and tap the screen again gently on the
2 bullets you're talking about. Based on your
3 understanding of the processes that Tonawanda Coke
4 engaged in in the management of this K087, which of
5 those bullets on the left-hand side persuade you
6 that this material fits within this
7 not-a-RCRA-waste category?

8 A. Well, again, I think there are really two
9 separate ones, the one that we just talked about,
10 which was continuous production process, but in
11 addition, I think it also meets the criteria for
12 direct reuse as a feedstock, meaning it's -- you're
13 taking this material and you're directly using it
14 in the process to manufacture another product, the
15 coke.

16 Q. And when you say a continuous production
17 process, are you indicating that it is a continuous
18 production process that is not interrupted by land
19 disposal?

20 A. It's not interrupted by land disposal; it's not
21 interrupted by storage, other than the type of
22 storage that would normally occur with your virgin
23 feedstock, the regular feedstock that you would
24 usually have.

25 Q. And as long as we are here, RCRA has a set of

1 permitting requirements for the treatment, storage,
2 and disposal of hazardous waste, correct?

3 A. Yes.

4 Q. And tell the jury, please, when do those RCRA
5 permitting requirements come into effect with
6 respect to this particular chart?

7 A. The permitting requirements come into effect if
8 you're over in the purple box. So if you're in the
9 purple box and you have something that's a solid
10 waste and it's a hazardous waste, and you're either
11 going to treat it, you're going store it, or you're
12 going to dispose of it, then you would need a
13 permit. But if you're going to recycle it, you
14 would only need a permit for any storage that you
15 were doing or disposal you were doing before the
16 start of the recycling process. You would not need
17 a permit for the recycling process itself.

18 Q. All right. If we could take this down, please.

19 Let me ask you -- shift gears for just a minute
20 and ask you a couple of questions about how the
21 RCRA regulations at the time they were first
22 enacted back in the 1980s -- how those regulations
23 apply to waste materials that had been abandoned
24 prior to the time that RCRA was enacted.

25 A. If a material was abandoned before the RCRA

1 regulations came into place, then when the RCRA
2 regulations came into place that material was not
3 regulated under RCRA unless the material was
4 actively managed after the date that the
5 regulations came into effect.

6 Q. Okay. So if a previous owner of a facility had
7 already discarded material before the effective
8 date of the RCRA regulations, was that material
9 subject to RCRA regulations immediately for
10 treatment, storage, or disposal, once those RCRA
11 regulations came into effect?

12 A. No. Not unless there was some intervening
13 action of active management after the effective
14 date of the regulations.

15 Q. Now, let me add an additional question on to
16 that hypothetical, please. So if a previous owner
17 had abandoned waste on a site, and a -- prior to
18 the enactment of RCRA, would that -- would a
19 subsequent owner of that site have any
20 responsibility for that abandoned material under
21 RCRA or any other environmental legislation even if
22 they hadn't actively managed the material?

23 A. They wouldn't have any responsibility to permit
24 that abandoned material. It is certainly possible
25 that if there were an unacceptable risk from that

1 material, there are other authorities, other parts
2 of both RCRA and other environmental laws, that
3 could make that entity address the risk associated
4 with it. But it wouldn't be RCRA permitting.

5 Q. All right. And that risk might involve cleanup
6 or other remediation, is that correct?

7 A. That's correct.

8 Q. But those authorities and those requirements
9 are separate and entirely distinct from the RCRA
10 permit requirements, is that correct?

11 A. That is correct.

12 Q. All right. Now, before we turn to the
13 indictment itself, I would like to ask you a few
14 questions regarding your review of the New York
15 State Department of Environmental Conservation RCRA
16 regulatory files concerning Tonawanda Coke. You
17 testified previously that you have reviewed those
18 files, and my preliminary question is: Do you
19 remember how many times between 1989 and 2009
20 Tonawanda Coke was inspected by the DEC RCRA
21 compliance inspectors?

22 A. Well, I think it was at least four. There was
23 an inspection in '89, and one in '90, and one in
24 2001, and I think one in 2007. I recall those.

25 Q. And did I hear you say 1989 as well?

1 A. '89 was the first one, yeah.

2 Q. And have you developed any opinions regarding
3 the conclusions that are contained in those RCRA
4 compliance inspection reports?

5 A. Yes. Are you asking all of the set of reports?

6 Q. Well, I'm asking you, first of all, have you
7 developed opinions about the conclusions that are
8 in them. All right?

9 A. Yes, I have.

10 Q. All right.

11 THE COURT: Can you repeat that? I'm not
12 exactly sure what your question is.

13 BY MR. LINSIN:

14 Q. Okay. Well, did you reach any opinions
15 regarding DEC's evaluation of Tonawanda Coke's
16 recycling of the K087 during those inspections
17 between 1989 and 2009?

18 A. Yes.

19 Q. All right. What are those opinions?

20 MR. PIAGGIONE: Objection, your Honor.
21 It's offering opinions about what they say? What
22 is the basis for that, your Honor?

23 THE COURT: Well, it's hard to decipher.
24 I mean, is this in the aggregate from all four
25 inspections, and are the conclusions the same so

1 they can be addressed as one?

2 MR. LINSIN: I'm happy to go through them
3 one by one, your Honor. We can begin with the
4 1989. Let me do it that way if it would be
5 helpful. I believe the answers will be the same,
6 but I will proceed in that manner.

7 MR. PIAGGIONE: I would also object that
8 this is now asking her to make a decision as to the
9 ultimate issue here, your Honor, whether or not
10 this was legitimate recycling that was approved and
11 accepted. In other words, that there was no
12 disposal.

13 THE COURT: Well, I don't fully understand
14 that objection. Let's get a question, and when we
15 get to what troubles you, object, and then I'll try
16 to deal with it then.

17 MR. PIAGGIONE: Thank you, your Honor.

18 BY MR. LINSIN:

19 Q. Let's focus, please, Miss Williams on your
20 review of that first RCRA inspection in 1989. You
21 read that inspection report, is that correct?

22 A. Yes, I did.

23 Q. And you have an understanding of what the prior
24 submissions that Tonawanda Coke had made to EPA, is
25 that correct?

1 A. Yes, I do.

2 Q. All right. Now, based on your understanding of
3 the RCRA regulations in 1989 and your review of
4 this DEC inspection report, do you have an opinion
5 as to the conclusions that DEC reached regarding
6 the handling of K087 by Tonawanda Coke in 1989?

7 A. Yes.

8 Q. All right. And would you please explain to the
9 members of the jury what those opinions are
10 regarding your review of the report, given the
11 regulatory context in 1989.

12 MR. PIAGGIONE: Objection, your Honor.
13 It's going to the ultimate issue here. She is
14 being asked to decide whether or not the defendants
15 broke the law or not as charged in this case.

16 THE COURT: All right. We're talking
17 about 1989. We're talking about determinations
18 that were made by the inspectors following their
19 inspection.

20 MR. LINSIN: And that's all we are --
21 that's all the question calls for, your Honor.

22 THE COURT: Without being any more
23 specific.

24 MR. LINSIN: No. Conclusions regarding
25 Tonawanda Coke's recycling of the K087 in 1989.

1 THE COURT: Well, I think it has to be
2 articulated that way. I mean, because she has to
3 address a particular determination rather than be
4 given carte blanche -- I mean, there's a lot of
5 determinations that were made, I think, in those
6 inspections, right?

7 MR. LINSIN: Your Honor, I intend -- I'm
8 happy to ask the question about recycling. I
9 believe that was my first question. I was then
10 going to ask about the small-quantity generator
11 determination.

12 THE COURT: Okay.

13 MR. LINSIN: Those are the two issues I
14 wanted to focus on in that inspection report.

15 THE COURT: All right. And I think that
16 makes a difference in terms of the objection. So I
17 think I'll sustain your original one, but I'll
18 permit individualized questions on both points that
19 you had just referenced.

20 MR. LINSIN: All right.

21 BY MR. LINSIN:

22 Q. Focusing on your review of the 1989 DEC
23 inspection, RCRA compliance inspection report, what
24 were your opinions with regard to the conclusions
25 that DEC reached concerning Tonawanda Coke's

1 recycling of the K087?

2 A. It's my opinion that for the inspectors to have
3 concluded in the 1989 inspection that this facility
4 did not need a treatment, storage, or disposal
5 permit, in order to do that, the DEC inspector
6 would have had to come to the conclusion that --

7 MR. PIAGGIONE: Objection, your Honor.
8 Now it's speculative. He would have had come to
9 the conclusion.

10 THE COURT: No. I think it might be
11 helpful if you had the witness identify what the
12 conclusion of the inspector was and then what her
13 conclusion is, and explain how she came to that
14 conclusion that's different from the other, if it
15 is different.

16 MR. LINSIN: Okay.

17 BY MR. LINSIN:

18 Q. As a threshold matter, after you reviewed the
19 1989 inspection report, did you -- did that report
20 indicate in any way that Tonawanda Coke required a
21 RCRA permit?

22 A. No. I mean, this inspection explicitly said
23 the activities at Tonawanda Coke did not require a
24 RCRA treatment, storage, or disposal permit.

25 Q. Now, given that conclusion, do you have an

1 opinion about what that conclusion about the
2 absence of a need for permit -- what that says
3 about the assessment of the recycling process that
4 was ongoing at Tonawanda Coke?

5 MR. PIAGGIONE: Objection, your Honor.
6 Now he's asking for a conclusion on that conclusion
7 of the inspector.

8 THE COURT: Well, I think he's asking for
9 this witness's opinion with respect to the factors
10 that were considered in arriving at the inspector's
11 opinion or the report's conclusion. I'll permit
12 that. I think that's okay. Overruled.

13 BY MR. LINSIN:

14 Q. Would you like me to restate the question, or
15 do you still have it? I'm happy to restate.

16 A. Why don't you restate it so I make sure I
17 answer the correct question.

18 Q. Okay. You testified a moment ago that you read
19 in this inspection report and the inspector
20 concluded that Tonawanda Coke did not need a RCRA
21 permit for the treatment, storage, or disposal of
22 hazardous waste, correct?

23 A. Yes.

24 Q. Now, given those findings in that report, what
25 are your opinions about what that inspector

1 concluded concerning the recycling activity that
2 was -- of the K087 that was ongoing at Tonawanda
3 Coke?

4 A. It's my opinion that the -- that the
5 inspector's determination, which is consistent with
6 my opinion, is -- concluded that the recycling --
7 that when the coal tar sludge was taken to the pile
8 to be mixed and entered into the coke ovens, that
9 the inspector concluded that it didn't need a
10 permit because it was in the process of being
11 recycled. It was not a solid waste. It was part
12 of a continuous manufacturing operation.

13 THE COURT: All right. Before you go on,
14 from your review of the report, was there
15 information in that report from the inspector that
16 stated that information?

17 THE WITNESS: Well, I have to piece
18 together the information that is in the report.

19 THE COURT: Okay. But my question was
20 that supports that determination, was there
21 specific information in the report that was
22 identical to what you just stated needed to be the
23 case?

24 THE WITNESS: I believe there is.

25 MR. PIAGGIONE: Objection, your Honor. It

1 is not. There is no mention of coal pile in that
2 report. The words "coal pile" do not appear in
3 that inspection report.

4 THE COURT: Okay. But the issue is the
5 recycling, correct?

6 MR. PIAGGIONE: Correct.

7 MR. LINSIN: The issue is the recycling.
8 And, your Honor, counsel is perfectly free to test
9 the witness's conclusion on cross-examination. And
10 I -- the exhibit is in evidence. We can call it
11 back up if need be. I was trying to get past this
12 as a threshold matter, as not to dwell on it.

13 THE COURT: Right. And the rule with
14 respect to experts is that the expert doesn't have
15 to provide all the underlying data in rendering the
16 opinion, and you can examine with respect to that.
17 But, to give some credit to Mr. Piaggione, I think
18 that was a follow-up to the way that I queried this
19 witness, so I don't think that was out of line
20 necessarily. But I'll allow you to proceed, with
21 the understanding of how I think permissible
22 cross-examination can be conducted from the manner
23 in which Mr. Linsin is eliciting the opinion of
24 this witness. If it gets out of line, I'll
25 entertain an additional objection, but I think

1 right now we're okay. A question, I guess, is
2 really what we need.

3 MR. LINSIN: All right.

4 BY MR. LINSIN:

5 Q. In your review of this 1989 inspection report,
6 did you also see any determination in that report
7 as to whether at that time Tonawanda Coke was
8 properly classified as a small-quantity generator
9 under RCRA?

10 A. Yes. The report stated that the facility was a
11 small-quantity generator.

12 Q. Now, do you know, based on the other consulting
13 work you've done and based on your review of
14 documents in this particular case, what the average
15 monthly production of K087 decanter tank tar sludge
16 at a coking facility is?

17 A. It's a very large generated waste stream. And
18 in the documents that Tonawanda Coke did submit in
19 1988, which I believe was entered into evidence
20 when I saw it on Monday, it stated -- they stated
21 that they were generating at least 1,000 kilograms
22 per month of the decanter tar tank sludge. I
23 think, in my experience, based on coke plants -- a
24 typical coke plant would generate far more than a
25 thousand kilograms a month.

1 Q. So your review of the EPA notification
2 indicated that Tonawanda Coke in 1988 had
3 designated itself, at least preliminarily, as a
4 large-quantity generator, correct?

5 A. Yes.

6 Q. All right. But you testified a moment ago that
7 in the 1989 inspection the DEC RCRA inspector
8 concluded that Tonawanda Coke was a small-quantity
9 generator, correct?

10 A. Yes.

11 Q. Now, what does that fact tell you about the DEC
12 RCRA regulator's conclusions with respect to
13 Tonawanda Coke's management of K087 in 1989 -- I'm
14 sorry -- K087 in 1989?

15 A. The inspector would have had to have concluded
16 that that material was not being stored, treated,
17 or disposed of prior to recycling, because if it
18 were, it would have to have been counted in terms
19 of how much waste was being generated. So it
20 couldn't have been possible for the facility to
21 have been a small-quantity generator if that
22 material was being -- was classified as a solid
23 waste and a hazardous waste and was being either
24 stored, treated, or disposed of.

25 Q. And does that conclusion -- what effect does

1 that conclusion regarding the small-quantity
2 generator have with respect to the opinion you
3 testified to a moment ago regarding the recycling
4 operations at the facility?

5 A. It supports my opinion that the recycling
6 operations at this facility, when reviewed by the
7 inspector, were found to be not a solid waste,
8 outside the need to have a RCRA permit.

9 Q. All right. Let's move to Count 19 of the
10 indictment, regarding K087. What is your
11 understanding of the violation that is alleged in
12 Count 19 of the indictment?

13 A. It's my understanding that the indictment
14 charges that Tonawanda Coke, between 2005 and 2009,
15 disposed of K087 waste on the tar field without
16 having a RCRA disposal permit.

17 Q. Now, you referenced it before, given the way
18 your testimony has developed, but so we have it all
19 here in one place, based on your review of the
20 documents and your review of testimony, what was
21 your understanding -- what is your understanding of
22 how Tonawanda Coke was managing its K087 waste
23 during that 2005-to-2009 time period?

24 A. It's my understanding that the material was
25 taken from the tar box in a front-end loader and it

1 was generally taken to the coal piles in the
2 coalfield. Now, there were times when it may have
3 been put on a pad, but that pad didn't even exist
4 until the 1994 time frame. So -- but between 2005
5 and 2009, it's my understanding that most of the
6 time it was taken directly to the coalfield, mixed
7 with the coal, and then taken from -- the mixture
8 was taken and placed into the -- into the coke
9 ovens for the manufacture of coke.

10 Q. Now, have you reviewed the testimony of Philip
11 Flax that was given during this trial, and were you
12 present in the courtroom this past Monday when
13 Mr. Jim Strickland testified?

14 A. Yes.

15 Q. Do you recall their opinions that in order to
16 be exempt from the RCRA permitting requirements the
17 recycling of the K087 material had to meet the
18 requirements of this 261.4(a)(10) exemption that
19 you've testified about?

20 A. Yes, I recall that.

21 Q. Do you agree with those opinions?

22 A. No, I do not.

23 Q. Why not?

24 A. Well, if we go back to the 1989 inspection,
25 just for -- it's very important in this regard --

1 there was no 261.4(a)(10) exemption in effect at
2 the time of the 1989 inspection. And yet the DEC
3 inspector correctly, I believe, found that that
4 recycling did not require a RCRA treatment,
5 storage, or disposal permit. And that's because,
6 it's my view, that that recycling was not a solid
7 waste. The material was not a solid waste when
8 recycled in that manner.

9 Q. All right. Now, we touched on this before --

10 THE COURT: When you say "in that manner,"
11 you're talking about the placement on the coal
12 piles?

13 THE WITNESS: Yes.

14 THE COURT: For reuse.

15 THE WITNESS: For reuse.

16 BY MR. LINSIN:

17 Q. Let's assume for a moment, as we did briefly
18 when we were looking at your chart, but let's
19 assume for a moment that this K087 material that
20 was generated at Tonawanda Coke met this definition
21 somehow of the solid waste in the center box of the
22 chart that you testified about. Do you have an
23 opinion as to whether the recycling of that K087
24 that was performed by Tonawanda Coke in the manner
25 you just described still met the specific

1 conditions of that exemption, this 261.4(a)(10)?

2 A. Yes, I do have an opinion on that.

3 Q. And in developing that opinion, have you taken
4 into account the definition of land disposal that
5 is applicable to this case?

6 A. Yes.

7 Q. All right. Now, would you -- what is your
8 opinion, first of all, whether it met that
9 exemption?

10 A. It's my opinion that it did meet the exemption.

11 Q. And would you please explain to the members of
12 the jury why you believe the K087 met the
13 requirements of that exemption, given the
14 definition of land disposal that applies in this
15 case.

16 A. Well, I think there are actually two reasons,
17 but one reason is the placement of the K087 on the
18 coal pile for the purpose of mixing was -- it's
19 really one reason. Let me combine it into one
20 reason. The placement of the K087 on the coal pile
21 for the purpose of mixing was really the first step
22 of the recycling process. At that point the
23 material was blended with the feedstock, it was
24 really no different than the feedstock, and the
25 recycling process had already started.

1 Q. And do you believe that that recycling process
2 that you've described, on the coal piles in the
3 coalfield, constituted land disposal?

4 A. No, I don't believe it constituted land
5 disposal, because you're talking about something
6 that's on a raw material feedstock pile. It's like
7 a land-based production unit. So it's a big pile
8 on top of 2 to 4 feet of packed coal. So I don't
9 believe it meets the definition of land disposal.
10 But I also believe that it already entered the
11 recycling process at the point in time that it was
12 placed on the piles for the purpose of mixing.
13 That was the start of recycling.

14 Q. Let me ask you, if you can, Miss Williams, can
15 you give some hypothetical examples, perhaps
16 unrelated to this case, but hypothetical examples
17 of what you believe would have constituted the land
18 disposal of K087.

19 THE COURT: Okay. Hold the question.
20 Yes? I'm sorry?

21 MR. LINSIN: She needs her inhaler.

22 THE COURT: Oh, I'm sorry. Okay. Do you
23 need a break? No?

24 A JUROR: I need my inhaler.

25 THE COURT: Chris, keep the door open,

1 please, so we --

2 Are you okay? Okay. All right. Let's reput
3 the question and start there.

4 MR. LINSIN: Yes.

5 Can you, Miss Williams, give some examples,
6 hypothetical examples, of the kinds of activities
7 concerning management of K087 waste that you think
8 would have constituted land disposal if they had
9 been engaged in?

10 MR. PIAGGIONE: Again, objection, your
11 Honor. Now we're getting into what is land
12 disposal. Examples of what is land disposal.

13 THE COURT: No, I don't think that's --
14 that's not what you're asking.

15 MR. LINSIN: No, your Honor.

16 THE COURT: Okay. All right. Just to
17 clarify for you, reput the question, because we're
18 talking about the individual activities -- well,
19 you're saying that hypothetically could constitute
20 land disposal.

21 MR. LINSIN: Could constitute land
22 disposal, given the definition of land disposal
23 that is applicable in this case.

24 MR. PIAGGIONE: Your Honor, by giving
25 those examples, she is going to redefine the

1 definition of land disposal.

2 THE COURT: I don't think so. All right.
3 I'm going to overrule your objection. You may --
4 can you answer that question?

5 THE WITNESS: I think so. I mean, I was
6 just going to give some examples of what is clearly
7 land disposal.

8 THE COURT: Well, if you think so, then I
9 can't allow it. So you have to put a question that
10 the witness knows she can answer.

11 BY MR. LINSIN:

12 Q. Are you able -- are you able, given the
13 definition of land disposal that applies in this
14 case --

15 THE COURT: And you know what that
16 definition, is I take it?

17 THE WITNESS: I do.

18 BY MR. LINSIN:

19 Q. Okay. Working with that definition and only
20 that definition, can you provide the jury some
21 examples of activity that, in your opinion, would
22 have constituted land disposal if they had been
23 engaged in?

24 A. One example that I can think of is if a bunch
25 of K087 was taken out to a part of the plant, not

1 on the coal piles, and just dumped there to be
2 abandoned.

3 Another example might be if a big pile of K087
4 was taken out to -- not on the coal piles, to
5 another part of the plant on the ground and piled
6 up in a big waste pile with the idea that it would
7 eventually be recycled, but it might be sometime in
8 the future. Years, two years, but eventually. So
9 those are two examples.

10 Q. All right. Now, in preparing for your
11 testimony, Miss Williams, did you review the
12 testimony that was provided in this trial from
13 certain witnesses that on a limited number of
14 occasions some of the K087 material from the
15 Tonawanda Coke operation was mixed with the coal on
16 the coal piles and then remained in that location
17 for a couple of weeks or even a month before it was
18 then charged back into the ovens?

19 A. I did see that testimony.

20 Q. And does that testimony change your opinion as
21 to whether Tonawanda Coke was, between 2005 and
22 2009, legitimately recycling the K087 material
23 without intervening land disposal?

24 A. It does not change my opinion.

25 Q. And would you please explain why it doesn't.

1 A. Because, again, once the K087 is mixed with the
2 coal, that material is now a feedstock. And like
3 any feedstock, you know, you have a normal
4 production rate where material is fed into a
5 process, but there are times when, for many
6 different reasons, the production rate may change,
7 the feedstock may sit there longer than normal, but
8 routinely, in the testimony I read, it was
9 typically fed in within 24 hours. The fact that on
10 occasion it could have sat there longer is no
11 different than what would happen in any kind of a
12 production process.

13 Q. Now, with respect to recycling activities
14 generally, do the RCRA regulations require that
15 there be a roof over the recycling or mixing
16 process that is ongoing?

17 A. No. There's no such requirement in the
18 regulations.

19 Q. And do the RCRA regulations require that
20 recycling activities be performed on a concrete pad
21 or a impermeable surface?

22 A. No, there's also no requirement for that. I
23 think I gave some examples of land-based production
24 units that are recycling that are occurring
25 directly on the ground.

1 Q. All right. Now, turning to Count 17 --

2 THE COURT: For example, again, was that
3 the mixing with --

4 THE WITNESS: The example I had given
5 earlier was the example of the heap leach piles for
6 copper and gold, where the acid is poured onto the
7 mineral-processing materials to leach out the gold
8 and the copper.

9 THE COURT: On the land itself?

10 THE WITNESS: That happens on the land,
11 yes.

12 BY MR. LINSIN:

13 Q. And without a concrete pad?

14 A. Without a concrete pad.

15 Q. All right. And that is, under the RCRA
16 regulations, an understood and acceptable recycling
17 process, is that correct?

18 A. Yes. I mean, there are other recycling
19 processes, as well, that occur on the land once the
20 recycling is started.

21 Q. All right. Let's turn, if we can, to Count 17
22 of the indictment. Have you reviewed Count 17 in
23 the indictment?

24 A. Yes, I have.

25 Q. And what is your understanding about what is

1 charged in Count 17?

2 A. It's my understanding that in Count 17
3 Tonawanda Coke was charged with storing hazardous
4 waste on the ground between -- D018 hazardous waste
5 on the ground between 1998 and 2009 without
6 obtaining a RCRA storage permit.

7 Q. And remind the jurors again, please, what is
8 D018.

9 A. D018 is a waste that is hazardous because it
10 has higher benzene levels than what the standard
11 is.

12 Q. So it would be one of the examples of these
13 characteristic hazardous wastes, correct?

14 A. Yes. It's a characteristic hazardous waste.

15 Q. Now, based on your review of the documents and
16 the testimony and the stipulations that have been
17 entered into during this trial, do you have an
18 understanding as to where the materials that were
19 in these Barrett tanks and on the ground around the
20 Barrett tanks originally came from?

21 A. Well, I think what -- it originally came from
22 the previous owner, and it had been abandoned by
23 the previous facility owner before Tonawanda Coke
24 purchased the facility.

25 Q. And before I ask you the next couple of

1 questions, are you aware of the definition for
2 "active management" that is applicable in this
3 case?

4 A. Yes, I am.

5 Q. All right. I want to ask you, based on your
6 experience and training, whether certain particular
7 activities would, in your opinion, constitute
8 active management as defined for the purposes in
9 this case.

10 First of all, can you discuss, in your opinion,
11 whether the spreading of coke breeze over an area
12 that contained previously discarded D018 waste
13 would constitute active management of that
14 previously discarded waste?

15 A. It's my opinion that it would not constitute
16 active management.

17 Q. And would you explain that opinion, please?

18 A. Well, the coke breeze is a product, and it was
19 placed in this area in order to -- to form a harder
20 surface so that it would be easier to access this
21 area. It's like putting a sidewalk down or a
22 boardwalk down. It's my view that -- that any
23 physical disturbance of the waste in that process
24 was incidental. The purpose was to put in a -- you
25 know, a firmer surface. So it's my opinion that it

1 does not meet the definition of active management.

2 Q. Now, do you also have an understanding as to
3 what the definition of "treatment" is under the
4 RCRA regulations?

5 A. Yes, I do.

6 Q. And would you explain that term to the members
7 of the jury?

8 A. RCRA has a definition of treatment. It's sort
9 of a two-part definition. The first part is, have
10 you physically, chemically, or biologically changed
11 the nature of the waste; and then the second part
12 is, for a series of purposes that are named in the
13 definition, so, for example, to neutralize the
14 waste, to make the waste less hazardous, to make
15 the waste more amenable to recovery. And there are
16 four or five different reasons. In order for
17 something to meet the definition of RCRA treatment,
18 it has to meet both parts of those definitions --
19 of the definition.

20 Q. Now, in your opinion, Miss Williams, would the
21 placement of coke breeze over the previously
22 discarded waste material, this 2D018 on the ground,
23 constitute treatment under the RCRA regulations?

24 A. It's my view that it does not.

25 Q. And would you explain the basis for that

1 opinion?

2 A. Well, I think it -- based on the evidence I
3 reviewed, it's not clear that it changed the
4 physical, chemical, or biological nature of the
5 waste; but even if it did in some way do that, I
6 reviewed carefully all the purposes of the
7 treatment definition, and it wasn't done for any of
8 the purposes that would constitute RCRA treatment.

9 Q. Are you aware, Miss Williams, of situations
10 where facilities have placed cover material like
11 coke breeze over previously discarded hazardous
12 wastes without it -- without that activity leading
13 to RCRA regulation of that previously discarded
14 waste?

15 A. Yes. Actually, it's -- it's quite a common
16 occurrence, in my experience.

17 Q. And would you give some examples of those
18 situations based on your experience.

19 A. Based upon my experience, it's often done,
20 particularly at older facilities that have been
21 around for a long time and they have old waste
22 disposal areas on the plant. Often those are
23 covered, for example, with asphalt to be used as
24 parking lots. Sometimes they're -- buildings are
25 constructed over these areas. So it's not -- it's

1 not an uncommon thing.

2 Q. And the activity you're describing, such as the
3 placement of a parking lot or even a building, is
4 that, in your experience, done even without prior
5 removal of that previously discarded waste?

6 A. Yes. In fact, it's usually done without prior
7 removal, and it's seen as a positive thing because
8 you're capping the surface in a way that prevents,
9 for example, rain and precipitation from getting to
10 the waste.

11 Q. And is that activity permissible and lawful
12 under the RCRA regulations?

13 A. Yes.

14 Q. And does that activity in any way subject the
15 previously discarded material to RCRA permitting
16 requirements?

17 A. Not in my opinion or experience.

18 Q. All right. In your review of the material and
19 testimony in this case, did you notice information
20 that some of the material from these Barrett tanks
21 may have been at one point or another released onto
22 the ground during the fire that occurred in 2008 or
23 subsequently during the dismantling of the Barrett
24 tanks themselves?

25 A. I'm sorry. Could you just repeat that, the

1 first part of the question?

2 Q. Sure. I apologize. In your review of all the
3 materials in this case and the testimony, did you
4 hear some reference to the possibility that some of
5 this material from the Barrett tanks may have been
6 released during the fire or the subsequent
7 dismantling of the tanks? Released onto the ground
8 in the area around the tanks.

9 A. Yes. I mean, I saw conflicting information on
10 this, because I saw the fire report that suggested
11 there wasn't anything released, but I also saw some
12 testimony that suggested there may have been
13 something that released during the fire.

14 MR. PIAGGIONE: Objection, your Honor.
15 Again, there's no report in evidence saying
16 anything was released or not.

17 THE COURT: Well, it can be the basis of
18 her report. Was it referred to in her report?

19 MR. LINSIN: It is, your Honor.

20 THE COURT: All right. Then you have
21 that, so you can --

22 MR. PIAGGIONE: We don't have that report.

23 MR. LINSIN: Your Honor, the DEC oil spill
24 report was referenced in the witness's summary of
25 her materials. Counsel has a copy of that report.

1 And there is also interview reports from the fire
2 chief, who was present at the scene, and counsel
3 has those interview reports. They generated them.

4 THE COURT: Okay. Record will so reflect.

5 BY MR. LINSIN:

6 Q. So you -- you saw some information and reviewed
7 some interview reports or saw testimony that there
8 may have been a release of some of the material
9 from inside one of these Barrett tanks, is that
10 correct?

11 A. I did see some of that testimony.

12 Q. In your opinion, Miss Williams, if -- assuming
13 for a moment if some of that material had leaked
14 out of the Barrett tank during the fire or at some
15 other point, would that action -- would that
16 leakage have constituted either -- well, we'll take
17 them one at a time. Would it have constituted
18 active management of that material for RCRA
19 regulation purposes?

20 A. It's my opinion that it would not meet the
21 definition of active management. It was a passive
22 event. I didn't see anybody say that there was
23 someone who took material and put it on the ground
24 or purposefully did that so it was movement of
25 material that had already been abandoned.

1 Q. And would it have been activity that would have
2 constituted treatment of that material under the
3 RCRA regulations?

4 A. No. Really for the same reason. This is
5 material that was abandoned back pre-1978, and
6 while it might have moved through some mechanism of
7 the fire, for example, that wouldn't meet the
8 definition of RCRA treatment either.

9 Q. Now -- so, based on all of the documents you
10 reviewed, the testimony you reviewed, and the
11 testimony you just referenced, do you have an
12 opinion as to whether or not the wastes on the
13 ground around these Barrett tanks became subject to
14 the RCRA storage regulations and requirements prior
15 to 2009?

16 A. I have an opinion, yes.

17 Q. And would you just -- would you please explain
18 that opinion to the members of the jury.

19 A. It's my opinion that -- that those materials
20 had been previously abandoned, and I did not see
21 any evidence of active management, so it's my
22 opinion that they do not need a RCRA storage
23 permit.

24 Q. All right. Now, did you also review testimony
25 and statements that at some point in 2009 some of

1 the material from inside the tanks and possibly
2 some of the material from outside of the tanks had
3 actually been excavated?

4 A. Yes, I did.

5 Q. And do you -- do you have an understanding as
6 to how that was actually accomplished?

7 A. It's my understanding that an excavator was
8 used to dig out some of this material and it was
9 put into a front-end loader and it was taken again
10 over to the coal piles in the coalfield for the
11 purpose of, again, mixing with the coal so that it
12 could be reinserted into the coke ovens as
13 feedstock.

14 Q. All right. Now, in your opinion, did the
15 excavation of some of that material from inside or
16 around these tanks cause the rest of that material
17 that remained in the tank or that remained on the
18 ground to become subject to the RCRA permitting
19 requirements?

20 A. It's my opinion that -- that it would not. The
21 answer is no to your question.

22 Q. And why is that?

23 A. Because the material that wasn't excavated is
24 still remaining where it was. Now, the material
25 that was excavated is actively managed. It's a new

1 point of generation of RCRA waste, and that
2 excavated material needs to follow all of the RCRA
3 requirements from the point it's generated until
4 it's either recycled or disposed of.

5 Q. All right. We'll get to that in a moment. But
6 staying with this Count 17, one last question,
7 please. Given your answers, then, to the previous
8 questions regarding Count 17, do you have an
9 opinion as to whether or not this D018 material
10 that remained on the ground or in the tanks around
11 the ground required a RCRA storage permit?

12 A. I do have an opinion.

13 Q. And would you please state what the opinion is
14 and explain it to the jury.

15 A. I have an opinion that the material that
16 remained on the ground or remained in the storage
17 tanks does not need a RCRA storage permit, because
18 it had been abandoned and it still was abandoned.
19 It was abandoned prior to the effective date of the
20 regulations covering that material.

21 Q. All right. Now I'd like to turn next to
22 Count 18 of the indictment. And have you reviewed
23 Count 18?

24 A. Yes.

25 Q. Would you explain to the jury what your

1 understanding is of the charges in Count 18.

2 A. Count 18 charged that material that was D018
3 had been excavated from in and around the area of
4 the Barrett tanks and taken to the coalfield for
5 mixture with -- on the coal piles without having a
6 disposal permit.

7 Q. All right.

8 A. And I think -- I don't remember if I said the
9 time frame. The time frame, as I recall, was
10 June 2009 through the end of 2009.

11 THE COURT: Well, when you say disposal
12 permit, do you mean treat and dispose, or are those
13 two separate permits?

14 THE WITNESS: I think -- they can be two
15 separate permits, but I think the charge was
16 disposal without having a disposal permit.

17 THE COURT: Well, I think the charge is to
18 treat and dispose.

19 BY MR. LINSIN:

20 Q. All right. Let's factor that into your
21 analysis, that the charge relates to treatment or
22 disposal of these materials that were excavated,
23 this D018. Now, you testified a moment ago that
24 this material that was excavated in 2009 from in or
25 around the tanks had to meet the recycling

1 requirements of 261.4(a)(10), is that correct?

2 A. Once the material -- once the material is
3 excavated, it's now a D018 hazardous waste. So now
4 the question is the same question we asked earlier
5 with the K087, which is: Based on what you do with
6 it, is it also a solid waste? So it's really a
7 very similar analysis.

8 Q. So, first of all, is it a solid waste?

9 THE COURT: Let's put the chart up.

10 BY MR. LINSIN:

11 Q. Okay. Could we have 0000 again, please.

12 And while this is coming back, can you explain,
13 please, what your -- I believe you testified to
14 this a moment ago, but based on your review of the
15 testimony and the materials, what is your
16 understanding of what was actually done with this
17 material once it was excavated from in or around
18 the tanks?

19 A. It's my understanding, again, that it was taken
20 in a front loader over to the coal piles in the
21 coalfield and mixed with the coal so that it could
22 be again fed back into the coke ovens.

23 Q. Okay. So if you wouldn't mind again, with
24 reference to Defendants' Exhibit 0000, we have with
25 respect to this count, Count 18, D018, a

1 characteristic hazardous waste, correct?

2 A. Yes.

3 Q. So it -- at least it is -- based on that
4 characteristic, it is potentially a hazardous waste
5 over in this purple box, correct?

6 A. Yes.

7 Q. But it's your testimony, if I understand it
8 correctly, that first you have to go through this
9 process of reviewing the definition of solid waste
10 that is represented in the center white box of this
11 exhibit, is that correct?

12 A. That's correct.

13 Q. Would you explain then, please, to the jury how
14 your analysis of whether or not the D018 that was
15 excavated from these tanks in 2009 -- how it should
16 be analyzed with respect to this definition of
17 solid waste in the center white box.

18 A. Okay. Well, it's -- it's a little bit
19 different than the analysis for K087, because the
20 D018 material would not be a continuous
21 manufacturing process, as I had discussed earlier,
22 because obviously it had been abandoned. It been
23 on the ground for quite a while. So at the point
24 that it's generated, if I look down here and see
25 whether it has any elements of discard, however, I

1 still don't find any of these elements of discard.

2 THE COURT: Well, you said "look down
3 here." Where are you talking about?

4 THE WITNESS: The center of a box of the
5 chart.

6 THE COURT: Okay. So you're looking at
7 what section of that? Abandonment?

8 THE WITNESS: I'm going down the entire --
9 each of the different items --

10 BY MR. LINSIN:

11 Q. Let's go one by one.

12 A. Sure.

13 Q. Okay. Do you have any information in what
14 you've seen that this excavated material, first of
15 all, was abandoned?

16 A. Once it's excavated, no.

17 Q. Do you have any information, based on review
18 all of the evidence and testimony, that the
19 material was speculatively accumulated as that term
20 is used in RCRA regs?

21 A. No, there's no evidence to that effect.

22 Q. Now, do you have any information that indicates
23 to you that the way in which that material was
24 handled, as you've just described, fit within any
25 of these recycling activities that have the

1 characteristic of a waste-like activity?

2 A. There's no evidence that it was recycled in any
3 of those ways that have elements of discard.

4 Q. All right. And was there any information that
5 you have that indicated the D018 material was
6 stored for abandonment?

7 A. No.

8 Q. All right. So, given that all of the answers
9 to those questions are in the negative, can you
10 tell the jury where in this chart -- where you
11 believe that D018 fits on the left-hand side of
12 your chart that you've prepared?

13 A. Okay. And I think it fits under the section
14 that says, "Certain secondary materials when
15 legitimately recycled."

16 Q. And would you tap on that, please. All right.

17 And would the subpart be there for direct --
18 I'm sorry -- for direct reuse?

19 A. It would fit under direct reuse. It actually
20 potentially could also fit under the characteristic
21 by-product or sludge when reclaimed. It wasn't
22 really being reclaimed, but it was characteristic,
23 and so whether it was reclaimed or put in the
24 process without reclamation, it was exempt.

25 Q. Let's assume, then, hypothetically that this

1 D018 for some reason actually fit within these --
2 one of these factors for a solid waste in the
3 center box here. And so let's then move over to
4 the gold box here for the D018 having fit that
5 definition of solid waste. Okay?

6 A. Yes.

7 Q. Presume this for a moment. In the way in which
8 this material was treated, as you've described, by
9 recycling on the coal piles in the coalfield, did
10 that activity meet one of the exemptions for the
11 definition of solid waste that is represented by
12 this broader rectangular gold box up here?

13 A. Yes, I believe it did.

14 Q. And would you explain how -- the basis for that
15 opinion?

16 A. Again, the exemption, the same one we talked
17 about previously, 261.4(a)(10), allows the material
18 to be recycled as not a solid waste when -- when
19 the recycling occurs without -- when -- I'm
20 sorry -- when, between the point at which the
21 material is removed and generated until the point
22 at which it's recycled, there is no land disposal
23 involved.

24 Q. So, now, you testified earlier that this
25 exemption, this 261.4(a)(10), applied to K087, the

1 coal tar sludge that is actively generated as a
2 part of the ongoing process. Does that same
3 exemption from the definition of solid waste also
4 apply to D018, this characteristic hazardous waste
5 that we've been discussing with regard to Count 18?

6 A. Yes. The exact same exemption would hold.

7 Q. Okay. So, in summary, Miss Williams, in your
8 opinion, did Tonawanda Coke require a RCRA disposal
9 permit in order to recycle the K018 [sic] material
10 on the coal piles, as you described, during the
11 period between 2005 and 2009?

12 A. On the dates -- I'm sorry. Are you asking
13 about D018?

14 Q. No. I'm going back to K087.

15 A. K087. No, it did not. It did not require a
16 disposal permit for the K087 recycling.

17 Q. And in your opinion, did Tonawanda Coke require
18 a RCRA storage permit with respect to that material
19 that was on the ground around the tanks between
20 1998 around 2009?

21 MR. PIAGGIONE: Objection, your Honor.
22 This has already been asked and answered. So was
23 the previous question. He has asked these
24 questions. Now he's repeating them at the end.

25 THE COURT: No, I don't think so. You're

1 now on --

2 MR. LINSIN: Your Honor, I am going
3 back -- I'm -- these are my last three questions to
4 summarize what has been somewhat complex testimony,
5 and I'm trying to tie them directly to the three
6 counts in the indictment.

7 MR. PIAGGIONE: She has already testified
8 about all three counts, reaching her conclusions on
9 all three counts, and now he's asking her those
10 conclusions again. That is asked and answered.

11 THE COURT: All right. This is the
12 wrap-up? Are we on K087 or D018?

13 MR. LINSIN: This was my first question on
14 D018, and I have one remaining question on D018,
15 and that is it.

16 THE COURT: Okay.

17 BY MR. LINSIN:

18 Q. All right. If I may, Miss Williams, may I
19 restate that question. In your opinion, did
20 Tonawanda Coke require a RCRA storage permit with
21 respect to the previously abandoned material that
22 was on the ground around the two old storage tanks
23 between 1998 and 2009?

24 A. It's my opinion that they did not require a
25 RCRA storage permit.

1 Q. And in your opinion, did Tonawanda Coke require
2 a RCRA permit to treat or dispose of the D018
3 material from those old storage tanks during 2009?

4 A. You're talking about to recycle it on the coal
5 piles?

6 Q. That's correct.

7 A. It's my opinion they do not need a RCRA permit,
8 either a treatment or a disposal permit.

9 MR. LINSIN: I have nothing further.
10 Thank you very much, your Honor.

11 THE COURT: Okay. Would you like a break?
12 I mean, you got to clear the head a little bit?
13 But let it sink in. Don't get rid of it. Okay.
14 And you're working. I know it's hard. I know it's
15 hard. But you've heard a lot, and, you know,
16 remember how much we've talked about the
17 application of common sense, experience,
18 intelligence. I mean, you're going to, as the
19 jury, probably have bits and pieces from everybody.
20 Not everybody is going to retain everything. And
21 then, you know, when you get down to discussing it
22 and resolving the things you don't remember, and
23 you're putting it together with -- or remember
24 well, and you put it together with everybody else's
25 discussion -- and don't forget, you're going to get

1 guidance in this. You're going to get instructions
2 in the law. You will be -- I mean, the facts will
3 be highlighted for you so that you know what issues
4 you have to decide in the context of the 19 counts
5 in the indictment.

6 So try not to get overwhelmed by it. Okay. It
7 will -- you know, just think about how much you
8 already know. Okay. Right? I mean, who would
9 have thought, right? I mean you go home and you
10 sing D018, K087, right? I mean, it's like music to
11 your ears. So -- all right. So go take a break
12 for 20 minutes. We'll see you here --

13 MR. LINSIN: Your Honor, I don't mean to
14 impose, but may I move 0000 into evidence as a
15 summary on these points?

16 THE COURT: You can move, I'll resolve it
17 after the --

18 MR. LINSIN: Okay. Thanks.

19 (Jury excused from the courtroom.)

20 THE COURT: Okay. Miss Williams, you can
21 step down. Thank you.

22 What are we going to do with your witness --
23 or, please have a seat, everybody. Thank you.

24 MR. PERSONIUS: You're talking to me,
25 right, Judge?

1 THE COURT: Yes.

2 MR. PERSONIUS: And I appreciate your
3 concern. I had asked him to be here at 3:30.
4 Unfortunately, I had a couple of questions for this
5 witness, because I'm -- I told you before this
6 isn't my area, and I'm not totally clear on this.
7 So I was going to ask a couple of questions of this
8 witness. And then Mr. Piaggione has his right, of
9 course, to cross.

10 So I don't know how long he's going to be.
11 This witness said if there was any way at all he
12 can get this done today, he'd like to. But again,
13 Judge, we do the best we can, and I appreciate your
14 concern.

15 THE COURT: I mean, realistically, I don't
16 think it's going to happen.

17 MR. PERSONIUS: Right.

18 THE COURT: So try to keep that in mind.
19 Okay.

20 MR. PIAGGIONE: I will have a few
21 questions, your Honor.

22 THE COURT: You only have a few questions?

23 MR. PIAGGIONE: No, I do have a few
24 questions.

25 THE COURT: Okay. All right. Then we'll

1 get to those after Mr. Personius clears things up.

2 MR. PERSONIUS: No, I won't clear it up,
3 but --

4 THE COURT: Okay. Well, and then I'll
5 rule on the chart. You know, I'll hear your
6 position out on that if you want. Do you still
7 have an objection to it, just so I know?

8 MR. PIAGGIONE: I do, your Honor.

9 THE COURT: Okay. All right. Okay.
10 We'll see you in about 15 minutes or so.

11 (Short recess was taken.)

12 (Jury not present in the courtroom.)

13 THE COURT: Before we begin, the
14 government's objection to quadruple zero.

15 MR. LINSIN: Quadruple O, your Honor, yes.
16 Letters. We're stuck with letters. I apologize.

17 THE COURT: No, no. That's okay. Is
18 there an objection?

19 MR. PIAGGIONE: Yes, your Honor. Again,
20 that is a repeat of the -- the law, first of all,
21 and I believe it's somewhat inaccurate, which we
22 can point out on cross, and it's meant to be an
23 aid -- I can't pronounce the word --

24 THE COURT: Demonstrative?

25 MR. PIAGGIONE: No, not demonstrative.

1 That's the easy one. Pedagogical exhibit as
2 opposed to a demonstrative.

3 THE COURT: What's the rule basis of your
4 objection?

5 MR. PIAGGIONE: 611, your Honor.

6 THE COURT: Pardon me?

7 MR. PIAGGIONE: 611.

8 THE COURT: Well, that gives me the
9 authority to manage the evidence.

10 MR. PIAGGIONE: Yes.

11 THE COURT: And what are you saying? That
12 it doesn't do that? Is that what you're saying?

13 MR. PIAGGIONE: Yes, your Honor. I'm
14 saying that that particular exhibit doesn't
15 accurately reflect the law, to begin with, which
16 we'll show on cross-examination, so they're
17 submitting something inaccurate. And all it's
18 supposed to be doing is depicting the law as an aid
19 to the law, which the Court would provide the
20 instructions on.

21 THE COURT: All right. Well, I'm not --
22 you know, I'll wait, and maybe after your
23 cross-examination you'll be able to convince me on
24 that, because what it does is establish a path
25 flow, as I see it, for consideration of elemental

1 considerations. But, Mr. Linsin?

2 MR. LINSIN: Your Honor, I just -- we're
3 happy to have the Court defer its ruling, but the
4 point is we believe this is -- would be a very
5 helpful exhibit for the jury, not to substitute for
6 the Court's instructions as to the law, but as a
7 summary of this witness's opinions, much as -- this
8 witness's opinions about the applicability of
9 particular regulations.

10 The government's witnesses have -- have offered
11 their opinions in that precise area, and this is
12 simply a reduction, not meant as a substitute for
13 the Court's instructions as to the law, but a way
14 that we believe would be very helpful to the jury
15 to understand her opinions.

16 THE COURT: All right. So you're moving
17 it under 1006? Is that what you're doing?

18 MR. LINSIN: As a summary, your Honor. We
19 do -- yes. We are moving it under 1006. We
20 understand it is not a summary of voluminous
21 documents per se, but we believe it is an
22 appropriate and fair summary of the witness's
23 opinions in a complex area, and we believe it would
24 be of assistance to the jury in assessing this
25 testimony.

1 THE COURT: Well, let me ask you this. Do
2 you have any objection if it were to be admitted as
3 demonstrative evidence and not substantive
4 evidence? And the reason why I say that is because
5 if you look at it, you know, when you talk about
6 the exemptions it just gives you a reference, a
7 statutory reference or a regulation reference,
8 without any specific information, which, you know,
9 from the standpoint of being the summary of an
10 opinion, I'm not so sure it suffices, because it
11 gives you a point of reference without any
12 information.

13 MR. LINSIN: Well, your Honor, we do not
14 have an objection if it was admitted as a
15 demonstrative exhibit. We do believe it would be
16 helpful for the jury to be able to make reference
17 to it as they deliberate. You know, to be candid,
18 a chart that would contain all of the detail that
19 the Court is referencing, we believe would just be
20 too complex to be helpful, and obviously it is not
21 meant as a precise, detailed recitation of all the
22 testimony, but as a summary that I think would help
23 the jury navigate and assess this testimony.

24 THE COURT: All right. Well, I mean, I am
25 troubled by one other thing, and that is the

1 absence of the line from the exemption box down to
2 the purple box. All right. So, you know, we will
3 have to deal with that as well.

4 MR. LINSIN: Your Honor, we have a
5 magician on our team who can make that happen, and
6 we would be more than happy to --

7 THE COURT: Is that Mr. Glasner?

8 MR. LINSIN: He has many talents, but
9 Miss Henderson, I think, would be able to help us
10 clarify that, as the witness had done in her
11 testimony at the Court's request. So --

12 THE COURT: Well, I am troubled by that.
13 So --

14 MR. LINSIN: Of course. And we
15 understand. That would be a helpful clarification,
16 and we would be happy to make that adjustment.

17 THE COURT: All right. Well, I'm going to
18 reserve. I mean, you know -- you may be surprised
19 by this comment, but, you know, some of this
20 testimony is somewhat complex, and, you know, the
21 jury, I think, is outreaching for some guidance.
22 And I just throw that out there, but I want
23 whatever it is, if there is going to be anything
24 demonstratively or substantively, to accurately
25 reflect the summary of testimony, and as it stands

1 right now without that line, I don't think it does.

2 So, you know, we'll wait to hear from the
3 magician as well, you know, in terms of getting
4 this finally resolved. And if it is pointed out
5 that this thing doesn't capture the essence of what
6 legal path has to be pursued in order for it to
7 result in a determination of -- of, you know,
8 whether we go left or right, then we'll just have
9 to decide it on that basis. But that will await
10 cross-examination or clarification from
11 Mr. Personius. Okay.

12 MR. MANGO: Your Honor, just if I may,
13 just so the record is clear, because I did look
14 into this prior to the introduction of the summary
15 exhibits through Mr. Conway, Special Agent Conway.
16 It would be improper for this to be admitted under
17 Rule 1006. 1006 is limited to evidence voluminous
18 in nature. It is -- and there is a commentary to
19 Rule 611(a). There is commentary that discusses
20 pedagogical exhibits are controlled by Rule 611(a).
21 And there's case law on that as well.

22 There's a case out of the Second Circuit, which
23 the Second Circuit has gone both ways in allowing
24 under 611 pedagogical exhibits to go to the jury or
25 to not go to the jury. And I want to make that

1 clear that in the government's view it would be
2 error if it was admitted under 1006. It would not
3 be error if it was admitted under 611(a).

4 THE COURT: Well, I mean, you never argued
5 1006, so I assume that you were conversant in
6 611(a)(1), I think, is where we really have to go
7 with this, and that's really where I have the
8 broadest discretion. No, I hear you. You're
9 basically saying it doesn't fit under 1006.

10 MR. MANGO: Right. Right.

11 THE COURT: You know, and I don't know if
12 Mr. Linsin's really disagreeing that it -- it
13 doesn't capture the summarization of voluminous
14 exhibits and that kind of thing. So, you know,
15 you're probably right, and I know that you came up
16 with the term pedagogical from somewhere, and
17 probably not from Mr. Piaggione, based on his
18 attempts at pronouncing it earlier.

19 MR. PIAGGIONE: Confirmed, your Honor.

20 THE COURT: All right. So, you know,
21 we'll reserve until we complete cross-examination.
22 But it is utilizable for purposes of both cross,
23 obviously, because you're going to attack the
24 credibility of that, I take it, and then it's
25 necessary for the clarification that Mr. Personius

1 is going to establish. So we have to move forward,
2 because we are running out of time. So
3 Mr. Personius, please.

4 MR. PERSONIUS: Should we call the jury
5 first?

6 THE COURT: Well, let's try it without a
7 jury and see how it goes.

8 Chris, if you would, please.

9 (Jury seated.)

10 THE COURT: Okay. I have a confession,
11 and the lawyers took me to task on this. I almost
12 forgot that we needed you to go forward. All
13 right. So, please don't take that personally.
14 Please have a seat. Welcome back.

15 I do want to tell you this, though. We're
16 going to make every effort to complete
17 Miss Williams's testimony, and then we're going
18 give you off tomorrow. Okay. And we will resume
19 on Monday. Okay. And that way everything gets to
20 gel. Okay.

21 The attorneys and parties are back present.
22 You are here. And Mr. Personius has some questions
23 of this witness, so he will be next. And remember,
24 common sense, experience, intelligence, the
25 application of that to resolving the fact issues in

1 this case. Okay. And it's doable. And it is up
2 to you to resolve them and come back with that
3 unanimous verdict.

4 Okay. Mr. Personius.

5 MR. PERSONIUS: Thank you, Judge.

6 CROSS-EXAMINATION BY MR. PERSONIUS:

7 Q. Good afternoon, Miss Williams.

8 A. Good afternoon.

9 Q. Sheila, could we please have Defendants'
10 Exhibit quadruple zero [sic] on the screen?

11 Do you see, Miss Williams, on the screen
12 Defendants' Exhibit quadruple zero?

13 A. Yes, I do.

14 Q. You've testified in answer to Mr. Linsin's
15 questions that this is an exhibit that you put
16 together?

17 A. Yes, I did.

18 THE COURT: Now, Mr. Personius, I was
19 corrected on this. Quadruple O.

20 MR. PERSONIUS: Oh, what did I say? Zero,
21 too?

22 THE COURT: Yeah. I probably led you down
23 that path. So we're on letters, ladies and
24 gentlemen. So -- now, they look somewhat alike,
25 but we're going refer to them for the record as O,

1 quadruple O.

2 MR. PERSONIUS: But there are no decimal
3 points in it.

4 THE COURT: Not on this one yet. But give
5 us some time. We'll probably add a few decimals
6 just to spice things up, ladies and gentlemen.

7 BY MR. PERSONIUS:

8 Q. I just wanted to try, if I could, for my own
9 edification, to clear up a little bit about your
10 chart. The white in the middle is -- if I
11 understand it, those are questions you would ask to
12 determine whether or not a particular material is a
13 solid waste?

14 A. That's correct.

15 Q. All right. And if a material is not a solid
16 waste, then you don't get to the hazardous waste
17 issue at all?

18 A. Well, I think the key aspect is in order to get
19 covered by the RCRA regulations it has to be both a
20 hazardous waste and a solid waste.

21 Q. All right.

22 A. And so RCRA -- the regulations are a little
23 circular in the way they look at it, because
24 typically you don't bother to ask the question of
25 do you have a solid waste unless you're starting

1 with something that you already know is probably
2 hazardous. So I think the simplest way to think
3 about it is for in order to enter into this path
4 where you need to get a potential RCRA permit, it
5 both has to be a solid waste and it has to be a
6 hazardous waste.

7 Q. Okay. And so the point of the middle, the
8 white part, is to say let's start with whether it's
9 a solid waste, and if we don't get past that, we
10 don't have to consider whether it's a hazardous
11 waste.

12 A. That's correct.

13 Q. And therefore, in your opinion at least, it
14 wouldn't be covered by the RCRA statute?

15 A. It wouldn't be covered by this set of
16 provisions in the RCRA statute.

17 Q. Okay. Now, you talked about -- in your
18 testimony about two different -- I don't know
19 whether to call them substances or what. One was
20 called K087?

21 A. Yes.

22 Q. Okay. Is K087 -- is that called a waste, or is
23 it just called K087?

24 A. Well, it's called decanter tank tar sludge.

25 Q. Okay.

1 A. So that's -- and if discarded, certainly it's a
2 waste. If recycled, it might have been a waste and
3 it might not be a waste.

4 Q. So that's an important distinction to you?

5 A. Yes.

6 Q. Okay. So we have the K087, and that would be
7 the material that was generated by Tonawanda Coke?

8 A. Yes.

9 Q. All right. And was picked up with the front
10 loader and taken out to the coal piles?

11 A. That's correct.

12 Q. Now, the other material you talked about was
13 called D018?

14 A. Yes.

15 Q. And that was the material that was -- was out
16 at these abandoned tanks?

17 A. Yes. That is the material that was found in
18 and around the tanks.

19 Q. Okay. When you say "in and around," both
20 inside and outside is both called this D018?

21 A. Yes.

22 Q. And again what is D018?

23 A. D018 is a characteristic hazardous waste that
24 is characteristic because it fails a specified
25 toxicity test for benzene, meaning that when you

1 test under this test procedure it has more benzene
2 than the cutoff level allows. So it's hazardous
3 because of benzene.

4 Q. And this D018 that was both inside and outside
5 these abandoned tanks, is it your testimony that if
6 nothing had been done with those at all by
7 Tonawanda Coke after they took over in 1978, that
8 material clearly would not be covered by the RCRA
9 statute?

10 A. That material would not be covered by the RCRA
11 permitting provisions within the RCRA regulations.
12 There are other parts of RCRA that really aren't at
13 issue in these charges that could still require the
14 facility to perhaps clean that up if it was causing
15 a risk, but it has nothing to do with the RCRA
16 permitting requirements.

17 Q. Okay. So if we could go back to your chart
18 that's on your screen, please. Defendants' Exhibit
19 0000. If you are in the white box, and you've
20 testified if we go back to the K087, that one you
21 of your opinions is that the K087 is not a solid
22 waste, so you went to the left, is that correct?

23 A. It's not a solid waste when it's being recycled
24 in the manner that we discussed.

25 Q. And is it your testimony that it has to qualify

1 under one of the boxes that are at the lower left
2 of your chart?

3 A. No. That's a -- that's actually a helpful
4 clarification question. I've listed a number of
5 examples of things that are not solid wastes.
6 There could be other things. This is not -- there
7 could be other types of materials that are not a
8 solid waste, as well, but I listed a representative
9 set of examples.

10 Q. Okay. All right. But as far as the K087 as it
11 was used here, if I recall, you said it might fit
12 into two of these different bullet points, is that
13 true?

14 A. Yes, that's what I said.

15 Q. Okay. Could you tell us what the first of
16 those two is again, please?

17 A. Well, I can't --

18 Q. It's okay. Is it the one above that?

19 A. It's the one above that. Continuous production
20 process. And there's another exemption, which is
21 the first small sub-bullet, that says "Direct
22 reuse," which means you take the material and you
23 directly use it as a feedstock.

24 The -- the difference between those two is in
25 direct continuous production there is usually not

1 any storage involved at all other than the typical
2 storage that you would have with a normal
3 production process. In the second one, which is
4 direct reuse, you're still reusing the material
5 without doing any special reclamation to it or
6 doing anything to the waste, but it's possible that
7 you might store it for a period of time before you
8 reuse it. So those are really -- that's really the
9 difference between those two.

10 Q. Okay. And for the indented bullet point, the
11 direct reuse, you've used that term, and it appears
12 in your chart, "feedstock." Could you clarify what
13 feedstock means?

14 A. Feedstock would just be a normal raw material
15 that goes into a production process. So in this
16 case coal would be a feedstock for the
17 manufacturing of coke.

18 Q. All right. And in that -- that indented bullet
19 point that you referred to after feedstock, it says
20 "Substitute for CCP." What is CCP?

21 A. CCP stands for commercial chemical product, and
22 that's one of the types of secondary materials that
23 the regulations discuss when they're saying what
24 type of recycling and what type of material.

25 Q. But that's not -- is that a concern in this

1 case at all, that CCP?

2 A. No. I didn't rely on that particular
3 provision.

4 Q. Okay. All right. So if we can -- I'm almost
5 done. If you go back to the white box, and
6 Mr. Linsin asked you some questions where he said
7 assume that with the -- let's start with the
8 K087 -- assume that it is a solid waste, so you
9 can't go to the left and you have to go to the
10 right. Are you with me?

11 A. I am.

12 Q. Okay. Then you're saying that you would follow
13 the yes down to the yellow box that says "RCRA
14 solid waste"?

15 A. That's correct.

16 Q. And then you follow the yellow line up to where
17 it has that 261.4(a) exemption with a question
18 mark?

19 A. Yes. And actually that -- there's lots of
20 261.4 exemptions, but there's only one that's
21 really potentially relevant to this particular
22 process, manufacture of coke.

23 Q. All right. And that exemption, again, has to
24 do with recycling?

25 A. Yes. All of these exemptions -- well, that's

1 not -- let me back up. Many of these exemptions
2 have to do with recycling, not all. But the
3 specific one that we've been talking about has to
4 do with recycling.

5 Q. All right. And so your testimony is based on
6 the facts as you understand them, that if the K087
7 is determined to be a solid waste, you still don't
8 have to have a RCRA permit, because of a recycling
9 exception? Is that what you're saying?

10 A. Well, what I'm saying is if it turned out it
11 was a solid waste, there is a whole set of
12 exemptions that you first again look at before you
13 decide whether or not this is a regulated solid
14 waste and hazardous waste. And if you're -- what
15 you're doing -- the material you have and what
16 you're doing with it meets the conditions in any
17 one of those exemptions, that's another way under
18 which the material and the activity is considered
19 exempt from RCRA permitting, and so it's another
20 way of getting over -- over here. But if you check
21 the -- the exemption and you look at the conditions
22 and you look at what you're doing and you say,
23 well, it doesn't meet that, then, as I was asked
24 earlier --

25 Q. You go back to the --

1 A. Then you go back to the purple box.

2 Q. Okay. All right. And the re -- is it your
3 second opinion regarding the K087 not being subject
4 to permitting because it fits this recycling
5 exemption?

6 A. Well, it's my opinion that it both -- it's not
7 a solid waste, because, really, the way I would
8 analyze it, first I'd go to the left of the box, so
9 I never get over to the right.

10 Q. I understand.

11 A. But if I were, hypothetically, over on the
12 right, I also believe it would meet the
13 261.4(a)(10) exemption.

14 Q. All right. And once you get to there, then the
15 question becomes whether or not there was land
16 disposal? You still have to satisfy that issue?

17 A. No. Well, you have to -- that's one of the
18 things you look at to decide whether or not it does
19 meet the 261.4(a)(10) exemption. If it meets the
20 exemption, that's the end of the discussion.

21 Q. But to meet it you'd have --

22 A. But to meet it you have to look at whether or
23 not there's land disposal involved prior to the
24 start of the recycling process.

25 Q. And was it your conclusion that based on the

1 facts as you understand them there was no land
2 disposal?

3 A. That is my opinion.

4 Q. Can you explain that to the jury, why you
5 conclude there was -- and you may have done this,
6 and I may have missed it, but I didn't really get
7 it. Why is it your opinion there was not land
8 disposal when that decanter tar sludge was taken in
9 the front loader and mixed in the -- in the coal
10 pile?

11 A. Because -- because that mixing occurred in the
12 feedstock pile. It didn't happen on the ground.
13 These coal piles are not the ground. They're a raw
14 material feedstock pile. They're a production raw
15 material. And below them is another 4 feet of coal
16 material. So I don't believe that that constitutes
17 land disposal under the definition that's been
18 provided for this case.

19 I also believe that at the time you take this
20 material, the K087, and you put it on the coal pile
21 for mixing, you've already started the recycling
22 process. And once you start the recycling process,
23 the issue of land disposal isn't -- isn't an issue
24 at that point. The question is between the time
25 that you generate this material, which is when you

1 take it out of the tar box, and when you start the
2 recycling, are you engaging in land disposal.

3 Q. Okay. And what about the argument that the
4 coal piles are sitting on the ground? How do you
5 respond to that?

6 A. Well, I mean, the fact -- there is a concept in
7 the RCRA regulations of a waste pile. And a waste
8 pile is when you take waste and you put it directly
9 on the ground, and that would be land disposal.

10 Q. Okay.

11 A. But the coal piles are not the ground. They
12 are a feedstock. You're mixing it in directly with
13 the feedstock. It's not on the ground. That's my
14 interpretation of the definition of land disposal
15 at issue in this case. And I think I mentioned
16 previously there is this concept of a land-based
17 production unit.

18 Q. Yes.

19 A. And I believe the coal piles and the mixing
20 is -- would fit within the concept of a land-based
21 production unit.

22 Q. I hate to do this, but you mentioned it. What
23 is a land-based production unit?

24 A. A land-based production unit is an activity
25 that is production related that could be in contact

1 with the land.

2 Q. And that's where you gave the example of the --
3 that I didn't understand, but it had something to
4 do with coins and beaches or leachates or
5 something?

6 A. Oh, it has -- it has to do with -- in the
7 mineral processing industry, when there's secondary
8 materials from the mineral processing, or primary
9 materials, they'll -- they'll use a ground-based
10 type of production, but they'll use a secondary
11 material to help get the copper and the gold out of
12 that material. But that whole process occurs on
13 the ground.

14 Q. And in terms of this issue of on the ground,
15 does it -- is it important at all that the -- the
16 coal piles are on a base of several feet of coal
17 themselves? Does that factor in at all?

18 A. Well, it further -- it further contributes to
19 my opinion that -- that mixing on the coal piles
20 does not constitute land disposal as it's been
21 defined for the purpose of this matter.

22 Q. All right. I have two other questions. If we
23 then go to the -- the D018, which was the tar that
24 was inside and outside these old tanks, and you've
25 testified about that being excavated and carried

1 over and itself put into the coal piles?

2 A. Yes.

3 Q. Okay. Is that the same analysis as you've just
4 given us for the K087, or is it somehow different?

5 A. It's a very similar analysis. The only
6 difference is that when I do my analysis and I go
7 to the left of the chart, I would not call that a
8 continuous production process. So -- because it's
9 been abandoned for many years. You now dig it up.
10 You have a new point of generation of waste. So I
11 would say the reason that that -- or the type of
12 activity that's going on there is direct reuse.
13 You've taken it, you have a new point of
14 generation, you take it over to the coalfield for
15 the purpose of mixing it with the feedstock, so
16 it's a direct reuse.

17 Q. All right. Last question. If you use the
18 white box in the middle and you conclude that the
19 material that you're considering and what the
20 circumstances are is not a solid waste, so you go
21 to the left on your chart, do you still concern
22 yourself at all with whether or not there's land
23 disposal?

24 A. No, you do not.

25 MR. PERSONIUS: Okay. Thank you, Judge.

1 THE COURT: Okay. Before we get to
2 Mr. Piaggione, the 261.4(a) exemption, you said
3 there are multiple of those exemptions.

4 THE WITNESS: Yes.

5 THE COURT: But only one that applies
6 here, and that's, at least in your opinion, the --
7 the fact that we're dealing with a coke operation?

8 THE WITNESS: Yes.

9 THE COURT: Okay. And then that triggers
10 whether it qualifies for an exemption under the
11 circumstances of the operation and then where it
12 goes, either to a non-RCRA waste or back down to
13 the hazardous waste?

14 THE WITNESS: That is correct. I mean,
15 again, in my analysis I don't ever have to get
16 there, but I do believe if you did that analysis,
17 that would also qualify for the exemption.

18 THE COURT: Okay. Mr. Piaggione.

19 MR. PIAGGIONE: Thank you, your Honor.

20 CROSS-EXAMINATION BY MR. PIAGGIONE:

21 Q. Good afternoon, Miss Williams.

22 A. Good afternoon.

23 Q. My name is Rocky Piaggione. I and my
24 colleague, Mr. Mango, represent the government in
25 this case.

1 Miss Williams, now, you indicated your degree
2 is in math and physics, is that correct?

3 A. That's correct.

4 Q. And you left the EPA in -- was it February or
5 March 1988?

6 A. I think it was the last day of February.

7 Q. Okay. And over the last 25 years you've been
8 employed as a consultant for industry, isn't that
9 correct?

10 A. Well, I think I said I spent three and a half
11 years employed at Browning-Ferris Industries, and
12 since that time I've been a consultant for both
13 governments and for industry.

14 Q. Well, isn't it fair to say you make a living
15 being paid for your opinion?

16 A. Well, I think -- I certainly do get paid for
17 the time I expended. I don't know that I would say
18 I get paid for my opinion. I'm not sure I
19 understand your question.

20 Q. Well, do you provide guidance to industry,
21 you've indicated, and to -- in some cases, I guess
22 you said, some local governments?

23 A. I think I said the Government of the United
24 States. I think I said the -- I have also provided
25 some consulting to various cities. I have provided

1 consulting to the governments of Canada and Mexico,
2 and I have also provided consulting to companies.

3 Q. Well, isn't it true that you said you testified
4 15 times, you said, I believe, in legal
5 proceedings?

6 A. I said with regard to RCRA, I think I said I
7 testified approximately 15 times.

8 Q. But isn't it true, based upon your resumé, that
9 you've testified in proceedings over 40 times,
10 isn't that correct?

11 A. As I recall the way the question was asked to
12 me, it was how many times had I testified
13 specifically with regard to RCRA matters. I have
14 testified many times with regard to other matters.

15 Q. And isn't that all regarding your opinion as it
16 was -- as an expert in these proceedings, is that
17 correct?

18 A. I don't think I understand your question.

19 Q. Well, are you being paid for your opinion when
20 you appear and testify in these proceedings?

21 A. I'm being paid -- when I testify at deposition
22 or in court, I'm being paid to take the time to do
23 a thorough analysis of the facts of the situation
24 and reach my own conclusions, and if I'm asked to
25 testify, I present those conclusions.

1 Q. You've done that at least 40 times, is that
2 correct?

3 A. I didn't count them up, but I have done them
4 approximately that number of times.

5 Q. And since 1988, has the EPA hired you to
6 testify for any reason?

7 A. I don't have any recollection of testifying for
8 the EPA. I have testified for the Government of
9 Mexico, for example.

10 Q. Okay. And fair to say you wouldn't be
11 testifying here today if you agreed with the EPA's
12 position in this case?

13 A. I think that's a fair statement. I mean, I
14 wouldn't be in a position to express my opinion
15 today if I wasn't comfortable that my opinions were
16 accurate.

17 Q. But if you agreed with the EPA, you would not
18 be here today testifying, isn't that correct?

19 A. Well, I guess that would depend on whether the
20 EPA asked me to appear to testify, but I wouldn't
21 be testifying, I suspect, on behalf of my current
22 client.

23 Q. And isn't it fair to say you wouldn't be
24 testifying here today if you were not being paid by
25 your client?

1 A. I normally do try and get paid when I work. I
2 think most of us try to do that.

3 Q. And can you tell the jury, are you being paid
4 on an hourly or on a flat-fee rate?

5 A. My firm -- my firm gets paid on an hourly rate.

6 Q. And how much is that an hour?

7 A. It's \$475 an hour that gets paid to my firm.

8 Q. And does that include whether you're sitting in
9 the court listening or testifying?

10 A. Well, it generally includes any time that I've
11 spent specifically working on the case.

12 Q. And you've been working on this case since
13 2010, I believe you said?

14 A. April of 2010.

15 Q. And yet you've never gone to Tonawanda Coke
16 Corporation, is that correct?

17 A. I did not -- I did not visit this particular
18 coke facility, no.

19 Q. So is it fair to say that you never saw the
20 recycling operation as it is alleged in this
21 indictment?

22 A. By the time I was engaged in this matter, it's
23 my understanding that the recycling operation had
24 been modified.

25 Q. And how was it modified?

1 A. It's my understanding that they began to use a
2 concrete pad for the mixing process.

3 Q. The concrete pad that in your opinion is not
4 necessary, is that correct?

5 A. It's a concrete -- yes, it's my opinion it's
6 not necessary, to be in compliance with RCRA.

7 Q. Okay. And have you been to any other coke
8 plants before -- before testifying here today?

9 A. I have not visited a coke plant. I have done
10 work at other coke plants.

11 Q. And so you've never really saw any coke
12 recycling operations at a coke plant, is that
13 correct?

14 A. I think that's -- that's -- I haven't visited a
15 facility where I've seen recycling operations, no.

16 Q. Okay. So I'd like to talk about your
17 experience at the EPA. You said you were involved
18 in the Office of Research and Development, is that
19 correct?

20 A. Yes.

21 Q. And you were doing statistical analysis and
22 mathematical modeling, is that correct?

23 A. I think what I said is I was -- I was doing
24 analysis of air pollution and health effects as
25 inputs to setting the National Ambient Air Quality

1 Standards.

2 Q. That does not involve RCRA, is that correct?

3 A. That did not involve RCRA.

4 Q. And then you worked with, from '72 to '78, test
5 procedures to measure emissions from vehicles, if I
6 understand that correctly?

7 A. Well, I mentioned quite a few things, but I was
8 in that office, yes.

9 Q. And that didn't involve RCRA, though, did it?

10 A. No, other than the time I said I mentioned that
11 I was -- had a special assignment on -- in the
12 Senate Public Works Committee, where I was involved
13 with RCRA and several of the other environmental
14 statutes.

15 Q. And that experience on the Senate lasted three
16 months, I believe it was?

17 A. Three to four months. I can't quite remember.

18 Q. Okay. And then from there you -- you went over
19 to the office of -- was it asbestos and pesticides?

20 A. No. It was the Office of Planning and
21 Evaluation.

22 Q. And that dealt with asbestos and --

23 A. No, that dealt -- that dealt with -- I think I
24 had mentioned that I had set up a central
25 statistical aid group for the agency, and that was

1 involved in reviewing the different major
2 regulations that EPA was promulgating, one of which
3 was the original proposed regulations under the --
4 for the RCRA program.

5 Q. And your job for that was to come up with a
6 statistical examination of the impact of
7 regulations, isn't that correct?

8 A. No, that's incorrect.

9 Q. What was it then?

10 A. It was to determine whether or not EPA had
11 collected adequate information to support the
12 positions that it was taking in those proposed
13 regulations.

14 Q. So you collected the information to support the
15 regulation, not to write the regulation, is that
16 correct?

17 A. We reviewed the information that the Office of
18 Solid Waste had put together, to make sure that the
19 requirements that were being put into the
20 regulations -- and this was a proposed
21 regulation -- were supported by the analysis that
22 had been done by that office.

23 Q. And when you worked with the -- from there you
24 went to the Office of Pesticides, is that correct?

25 A. That's correct.

1 Q. And that dealt with the use of pesticides, I
2 believe?

3 A. Generally. Again, it had to do with ensuring
4 that pesticides that were in use were safe.

5 Q. And that had nothing to do with RCRA, however,
6 did it?

7 A. It did not have anything to do with RCRA,
8 although I was involved with working on pesticide
9 disposal, and that was coordinated with work that
10 was done in the Office of Solid Waste.

11 Q. And, in fact, when you worked with the Office
12 of Toxic Substances, that had to do with asbestos
13 and PCBs, is that correct?

14 A. Well, there are about 50,000 different
15 chemicals in commerce, and our office dealt with
16 all of them. You've mentioned two of them.

17 Q. Those substances, however, if they're
18 controlled under the Toxic Substance Control Act,
19 they're not controlled under RCRA, isn't that
20 correct?

21 A. No, that's not correct either. I mean, parts
22 of the regulation of them, how they're being used,
23 are controlled under the Toxic Substances Control
24 Act, but for most of the chemicals in use in this
25 country, when they get disposed of they get

1 regulated under RCRA. So it's not an either/or.

2 Q. But that portion of it, the disposal, was not
3 controlled under the division you were with.

4 A. Certain types of -- actually, TSCA is a very
5 broad statute, and so it does allow the regulation
6 of disposal, and certain types of disposal were
7 regulated under TSCA, but I think it's outside the
8 relevance of this case.

9 Q. And when you went to the Solid Waste Program in
10 September of 1985, you stayed there until February
11 of 1988, and that was the work that you
12 specifically dealt with RCRA, isn't that correct?

13 A. That was full time managing RCRA, yes.

14 Q. And for those 29 months that you worked at
15 RCRA, how many coke-producing facilities did you
16 inspect?

17 A. I didn't inspect any coke-producing facilities
18 at that time.

19 Q. How about in those 29 months how many RCRA
20 inspections did you conduct?

21 A. I wasn't personally conducting RCRA inspections
22 during that period of time. My job was to develop
23 the regulations and to issue all the guidance on
24 how to do permitting, and to get the permitting
25 program put into place, and to issue training on

1 the regulations to the regions and states. And I
2 won't repeat it all, but my job wasn't to do
3 inspections.

4 Q. And how many --

5 A. But my job was to develop and provide input
6 into the manual that did explain to inspectors how
7 to inspect.

8 MR. PIAGGIONE: Your Honor, if the witness
9 could please just answer the question.

10 THE COURT: She's doing that.

11 MR. PIAGGIONE: Okay. How many RCRA
12 inspection reports --

13 MR. LINSIN: Your Honor --

14 MR. PIAGGIONE: -- did you personally
15 review?

16 MR. LINSIN: -- may I interject just a
17 moment, please, and ask that the witness be
18 permitted to repeat the last portion of her
19 response that Mr. Piaggione just spoke over.

20 THE COURT: Okay. Do you recall your
21 answer?

22 THE WITNESS: Yes. I think I just said I
23 also was involved in developing the 1988 RCRA
24 inspection manual, which was, in fact, provided to
25 the regions and the states for their use as

1 guidance in performing inspections.

2 MR. PIAGGIONE: And as a result of that
3 manual, they did do RCRA inspections, is that
4 correct?

5 THE COURT: What's your question?

6 BY MR. PIAGGIONE:

7 Q. Withdrawn.

8 How many RCRA inspection reports did you
9 personally review while you were at the EPA?

10 A. I don't think I could give you a specific
11 number. It's not a large number. But I think I
12 mentioned that we went out to the regional offices
13 to do oversight of visits, and we probably visited
14 three -- three regions a year, and during those
15 visits we did review certain inspections and we
16 reviewed certain permits. So some number, not a
17 large number.

18 Q. And with respect to the regulations for the
19 recycling of K087 waste, the finalization of those
20 regulations did not occur while you were in the
21 office -- in the EPA, isn't that correct?

22 A. Well, I think it depends upon which set of
23 regulations you're talking about. The regulations
24 that deal with the definition of solid waste were
25 finalized during my tenure in the office. The

1 very --

2 Q. But the regulations for -- I was asking about
3 the regulations for the recycling of K087 waste,
4 specific regulations for K087 waste. Those were
5 not finalized while you were in the EPA, isn't that
6 correct?

7 A. If what you're referring to is the regulations
8 under 261.4(a)(10), those regulations were not
9 finalized when I was in the agency, but those are
10 not the only regulations that cover the recycling
11 of K087.

12 Q. Okay. I believe we're at a difference of
13 opinion on that point. However, we'll go forward.

14 MR. LINSIN: Your Honor --

15 THE COURT: All right. Ladies and
16 gentlemen, what the attorney believes in terms of
17 differences of opinion, that's not evidence.
18 That's not for you to consider.

19 You know better than that, Mr. Piaggione.

20 MR. PIAGGIONE: Yes, your Honor. I'm
21 sorry.

22 BY MR. PIAGGIONE:

23 Q. Now, are you familiar with the term "generator"
24 as it's used in RCRA?

25 A. Yes, I am.

1 Q. And are you familiar with the responsibilities
2 imposed upon a generator by RCRA?

3 A. Yes, I am.

4 Q. And one of those responsibilities is that the
5 generator make a determination if a solid waste is
6 a hazardous waste or not, is that correct?

7 A. A generator has a responsibility, at the point
8 in which he generates a waste, to determine whether
9 that material is a hazardous waste and also whether
10 it's a solid waste. So that is a generator
11 responsibility.

12 Q. Okay. And you're aware in this case the
13 generator made a determination as to what his
14 waste -- that what his material was, isn't that
15 correct?

16 A. I'm not sure I understand your question.

17 Q. Did Tonawanda Coke Corporation, as a generator,
18 identify its waste as K087?

19 A. Yes, it did -- it did identify that it
20 generated K087.

21 Q. And by doing so and notifying the EPA, they had
22 told the EPA that K087 is a solid and hazardous
23 waste, isn't that correct?

24 A. They notified EPA that they were generating
25 that waste. They aren't -- that's -- that doesn't

1 answer the question of what they're doing with the
2 waste. So if they were -- I mean, yes, they said,
3 "We're generating K087 waste," but they're not --
4 but that's not the end of the question. You have
5 to look at what they are doing with it.

6 Q. Right. And didn't Tonawanda Coke indicate that
7 what they were doing was recycling that waste?

8 A. That's correct. That's what they said.

9 Q. All right. And you stated that the first step
10 in the recycling process starts with the mixing of
11 the coal, is that correct?

12 A. Yes.

13 Q. Okay. And you said you read the testimony of
14 Mr. Flax and Mr. Corbett and you heard the
15 testimony of Mr. Strickland, is that correct?

16 A. Yes, that's correct.

17 Q. And each of them testified that the mixing of
18 the coal -- mixing of the K087 with the coal on the
19 coal piles was a violation of land disposal, isn't
20 that correct?

21 MR. LINSIN: Your Honor, I believe it
22 misstates the testimony, and I'm surprised counsel
23 is now beginning to ask questions about this issue
24 to which they objected on direct.

25 MR. PIAGGIONE: I don't believe it's --

1 THE COURT: Well, I mean, to the form of
2 the question, I'm going to sustain the objection.

3 BY MR. PIAGGIONE:

4 Q. Okay. Mr. Flax, Mr. Corbett, and
5 Mr. Strickland testified that they considered the
6 mixing of the K087 with the coal on the coal pile
7 as voiding the exclusion for recycling under
8 264(a)(10) [sic], isn't that correct?

9 A. Well, I mean, I -- I mean, I'm not sure that I
10 would characterize what they said exactly the way
11 you are, but it's very clear to me that my opinion
12 is not identical to theirs, if that's the question
13 that you're asking.

14 Q. Right. And the EPA -- didn't the EPA state in
15 1992 that the recycling exclusion is conditioned
16 on --

17 MR. LINSIN: Your Honor --

18 MR. PIAGGIONE: -- there being no plant
19 disposal?

20 MR. LINSIN: -- your Honor --

21 THE COURT: Wait a minute. Wait a minute.
22 We have an objection, I think.

23 MR. LINSIN: Yes. I don't know what
24 counsel is reading from, and statements of policy
25 or interpretation are not appropriate in the form

1 of a question. EPA stating something, if
2 Mr. Piaggione wishes to inquire about a regulation
3 that was in effect, I will withdraw my objection,
4 but that didn't seem to be where this is going.

5 THE COURT: Well, you know, the EPA -- I
6 mean, that can include an awful lot of individuals
7 divisions, and the like, time periods, regulations,
8 documents, et cetera, et cetera. I think it goes
9 right down to the form of the question, which I
10 will sustain the objection to.

11 MR. PIAGGIONE: In 1992, when the EPA
12 promulgated its regulations for the recycling of
13 K087 waste, it stated in a --

14 MR. LINSIN: Your Honor --

15 THE COURT: Same objection. Same ruling.

16 MR. LINSIN: Same objection. Yes.

17 BY MR. PIAGGIONE:

18 Q. Didn't -- doesn't the regulation say that
19 recycling exclusion is conditioned upon there being
20 no land disposal of the residues at any point from
21 residue generation to the coke ovens? Didn't it?

22 A. That isn't the exact wording of the exclusion.
23 It says until it's recycled into the coke ovens, I
24 think. That's -- something like that. So the
25 question is, you have to look at the question of

1 where recycling starts.

2 Q. Doesn't it say recycling to -- into the coke
3 ovens?

4 THE COURT: What are you referring to,
5 please?

6 MR. PIAGGIONE: I'm referring to, your
7 Honor, 264 --

8 MR. LINSIN: It's --

9 MR. PIAGGIONE: -- .4.

10 THE COURT: 261 or 264?

11 MR. PIAGGIONE: 261.4(a)(10). Sorry, your
12 Honor.

13 BY MR. PIAGGIONE:

14 Q. Doesn't it say that there be no land disposal
15 of the wastes from the point they are generated to
16 the point they are recycled to coke ovens?

17 A. Well, it says recycled to the coke ovens. And
18 the question is what is the point at which that
19 recycling to the coke ovens starts.

20 Q. And isn't it the opinion of the EPA, as
21 testified to, that --

22 MR. LINSIN: Your Honor --

23 MR. PIAGGIONE: -- testified to in this
24 court --

25 MR. LINSIN: Your Honor, form of the

1 question, please.

2 THE COURT: Yeah. The form of the
3 question, sustained.

4 BY MR. PIAGGIONE:

5 Q. And isn't it -- the testimony in this case
6 that -- from Mr. Flax, from Mr. Strickland, that
7 the recycling first step was when it's reinserted
8 in the coke ovens?

9 A. I understand that that was their testimony, and
10 I provided my opinion. And, I mean, I think that's
11 why we're here. We have different opinions.

12 Q. So what you're saying is your opinion is --
13 differs from the testimony of the EPA officials and
14 the DEC officials who testified in this case?

15 A. I think my opinion does differ from the EPA and
16 the DEC officials. It's also my opinion, which I
17 didn't hear them express, that this material is not
18 a solid waste. It goes to the left-hand side of
19 the chart. You don't even have to ask the question
20 of whether the exemption is applicable, although I
21 believe it is.

22 Q. However, Tonawanda Coke identified itself as
23 producing K087 waste, isn't that correct?

24 A. Yes, and it also said it recycled the waste,
25 and it also --

1 Q. So based upon --

2 MR. LINSIN: Your Honor, please, may the
3 witness be permitted to finish her answer?

4 THE COURT: Yeah, I think so. Complete
5 your answer, please, Miss Williams.

6 THE WITNESS: Just that they also said
7 that they recycled the waste and that -- and that
8 that recycling involved putting it back as a
9 feedstock for coke manufacture. And that was
10 information that was available to the government,
11 and DEC had that information when they went out to
12 do the 1989 inspection.

13 BY MR. PIAGGIONE:

14 Q. Miss Williams, the information, as indicated, I
15 believe, indicates -- excuse me. Withdrawn.

16 Using it as feedstock, where is that in the
17 information that was provided to the DEC?

18 A. Well, it was information that the 1989
19 inspector determined and wrote on the inspection
20 form. And I might point out that at the time of
21 the 1989 inspection, when that inspector decided
22 there was no need for a TSD permit, there was no
23 exemption under 261.4(a)(10). That exemption
24 hadn't been written yet.

25 Q. Miss Williams, where does it say feedstock in

1 the 1989 inspection?

2 A. It said it was used as a raw material, is my
3 memory of the way it was described.

4 Q. And where does it say coal piles in the 1989
5 inspection?

6 A. It doesn't mention coal piles, but in 1989
7 there was no pad in the facility, there was no
8 exemption in the regulations for 261.4(a)(10), so
9 the analysis the DEC inspector would have had to
10 have done would have been to assume or recognize
11 when he went out to do the inspection and look at
12 where the waste was generated and how it was
13 recycled. That's what the guidance manual, the '88
14 inspector manual, says. Look at the waste, K087,
15 from the point that it's generated and watch it
16 through the process.

17 MR. PIAGGIONE: Your Honor, I'm going to
18 have to ask if the witness would just answer the
19 questions. She is going on way beyond anything
20 I've asked.

21 THE COURT: Well, do your best to answer
22 the question as you understand it, please.

23 BY MR. PIAGGIONE:

24 Q. Miss Williams, when the 1989 inspection
25 occurred, was there any indication that the coal

1 piles were observed, in the inspection report?

2 A. The inspection report is silent, but it is
3 my --

4 THE COURT: Okay. And that's fine. Go
5 ahead. Next question, please.

6 BY MR. PIAGGIONE:

7 Q. And you heard the testimony of Mr. Corbett, did
8 you not? Or rather you read the testimony of
9 Mr. Corbett, did you not?

10 A. I did read it.

11 Q. Okay. And he said he did not see the process,
12 is that correct?

13 A. That's my memory. I believe that's what he
14 said.

15 Q. And you concluded that all the inspections
16 indicated that the recycling was done on the coal
17 piles, isn't that correct?

18 A. Would you please repeat the question?

19 Q. Didn't you say -- specify that your evaluation
20 of all the inspections by the RCRA inspectors in
21 this case concluded that they -- that the coal
22 was -- that the K087 waste was being mixed on the
23 coal piles, isn't that correct?

24 A. I don't -- I don't believe that's what I said.
25 I said that is what was going on. I don't think I

1 said that the inspection stated that.

2 Q. Can you find in any of the inspection reports
3 any evidence that the inspectors observed the
4 mixing of the coal and the K087 waste on the coal
5 piles?

6 A. The inspections are silent to that issue. I
7 think what I testified to was that --

8 THE COURT: Okay. Let's leave it right
9 there.

10 BY MR. PIAGGIONE:

11 Q. So you assumed, then, that that is what
12 occurred, isn't that correct?

13 A. No, I did not assume it. I used other
14 information that was in the inspection, including
15 the fact that it was a small-quantity generator.

16 Q. But, Miss Williams, from the beginning the
17 generator indicated that he was deducting his
18 quantity of waste being generated because he
19 claimed he was recycling, isn't that correct?

20 THE COURT: Try that question again,
21 please.

22 MR. PIAGGIONE: Okay. Withdrawn, your
23 Honor. I'll come back to that in a little while.

24 BY MR. PIAGGIONE:

25 Q. Miss Williams, with respect to this

1 Exhibit 0000, you stated that the definition in the
2 middle was based upon 261.2(b), is that correct?

3 A. I don't think I gave a regulatory citation. I
4 said it was based upon the definition of solid
5 waste which is found in the regulations in 261.2.

6 Q. Okay. And in those regulations under 261.2
7 there are more definitions for if a material is
8 discarded, isn't that correct?

9 A. There's one or two others that were not really
10 at issue in this case, and so I didn't include them
11 on the chart. They have nothing to do with the
12 activities that we're talking about here.

13 Q. Well, isn't one of them, "Used in a manner
14 constituting disposal, or solid wastes when they
15 are applied or placed on the land in a manner that
16 constitutes disposal"?

17 A. I believe I have that on there, if you would
18 look at my chart.

19 Q. Which one is that?

20 A. It says, "Recycled by being used on the land,"
21 and I think I even gave an example of it when I
22 provided my testimony before.

23 Q. Miss Williams, there is a separate section for
24 used on the land which follows 1(b) -- excuse me.
25 It's 261.2(c)(1)(B), which is, "Used to produce

1 products that are applied or placed on the land or
2 otherwise contained in products that are placed on
3 the land," isn't that correct?

4 A. I'm well aware of that exemption, and that's
5 what I have summarized on this chart by saying
6 recycled -- that if materials are recycled in
7 certain ways, based on the type of material, they
8 can be considered to have discard and be a solid
9 waste. And one of the ones I listed was "used on
10 the land." And I gave an example of it to the
11 jury, which was the fertilizer example I give.

12 Q. Correct. But that is not applied or placed on
13 the land in a manner that constitutes disposal, is
14 it?

15 A. I'm afraid I don't understand your question. I
16 mean, there's --

17 THE COURT: Well, let's leave it at that.

18 BY MR. PIAGGIONE:

19 Q. Okay. Does the -- does the definition of solid
20 waste include materials which are applied or placed
21 on the land in a manner that constitutes disposal;
22 and, in fact, there is a separate section, is there
23 not, that says, "Used to produce products that are
24 applied to the land," as in used on the land, isn't
25 that correct?

1 A. There's one section, and that section under
2 261.2(c) discusses that if you're recycling and the
3 nature of the recycling you're doing is to take the
4 material and use it on the land or to make a
5 product with it where the product you're making is
6 then applied to the land, that that would be
7 considered a solid waste.

8 And, number one, I have included it on my
9 chart; and, number two, I don't believe it's
10 relevant to the situation with regard to the K087.

11 Q. Again, you still leave out the section "applied
12 to or placed on the land in a manner that
13 constitutes disposal." Do you know the definition
14 of "disposal," Miss Williams?

15 MR. LINSIN: Your Honor --

16 THE COURT: Okay. Let's -- I mean, you
17 ran two questions in there. I mean, you've asked
18 her, I think, a number of times. She said it's
19 included on her chart. She explained it. You may
20 not have gotten the answer exactly the way you
21 wanted it, but I think you can argue whatever you
22 want. Let's move on.

23 MR. LINSIN: Yes. Thank you, your Honor.

24 BY MR. PIAGGIONE:

25 Q. So, Miss Williams, looking at that middle box

1 again for abandoned, isn't "abandoned" further
2 defined in Section 261.2?

3 A. Yes, it is.

4 Q. Okay. And isn't abandoned described as --
5 discarded material that is abandoned as being
6 disposed of, isn't that correct? Abandoned by
7 being disposed?

8 A. It's a little more complete than that. It's
9 disposed of or incinerated. I mean, there's a
10 definition.

11 Q. Well, the definition is -- isn't it being
12 disposed of; it just simply says materials of solid
13 waste --

14 THE COURT: What are you referring to
15 right now, please?

16 BY MR. PIAGGIONE:

17 Q. Okay. Excuse me. Doesn't 261.2(b) state:
18 Materials are solid waste if they are abandoned by
19 being, one, disposed of? Isn't that correct?

20 A. That's correct, I think. I gave an example of
21 that. When you take material out and you put it
22 out in a part of the field and you leave it there
23 to be disposed of, that's an example of what's
24 meant by disposed of.

25 Q. And it's -- so the waste on the ground that was

1 placed there in 1978 and stayed, was abandoned by
2 its owner, in your opinion that wasn't being
3 disposed of?

4 A. The waste that was placed on the ground
5 pre-1978 by the previous owner was disposed of by
6 that owner prior to the effective date of the RCRA
7 regulations.

8 Q. So that would make it a solid waste, however,
9 wouldn't it?

10 A. No, because RCRA does not cover materials that
11 were already discarded, abandoned at the time the
12 regulations went into effect, unless those
13 materials were later actively managed.

14 Q. And it's your opinion that -- did you hear the
15 testimony of -- did you read the testimony of the
16 employees who managed some of that material on the
17 ground?

18 MR. LINSIN: Your Honor, I'm not even sure
19 what the question is. Form of the question, your
20 Honor.

21 THE COURT: It's -- on that grounds I'll
22 sustain the objection.

23 MR. PIAGGIONE: Okay. Take a different
24 approach, your Honor.

25

1 BY MR. PIAGGIONE:

2 Q. Under the definition of solid waste, the first
3 step is to determine if a material is discarded,
4 right?

5 A. Yes, that's accurate.

6 Q. And the term "discarded" includes any material
7 that is abandoned or recycled, correct?

8 A. No. It includes any material that is abandoned
9 or any material that is recycled in certain ways,
10 not any material that's recycled. Only certain
11 types of recycling and certain types of materials.

12 Q. Okay. Let's talk about recycling. Materials
13 are solid wastes if they are recycled or
14 accumulated -- I'm going to refer you to 261.2(c)
15 again. "Materials are solid waste -- "materials
16 are solid waste if they are recycled or
17 accumulated, stored, or treated before recycling,
18 as specified in paragraph (c)(1) through (4) of
19 this section." And that includes, (1)(A), "applied
20 or placed on the land in a manner that constitutes
21 disposal." Is that correct?

22 A. Are you asking me are you reading it correctly?
23 I'm not sure I understand your question.

24 Q. Isn't it true that if you want to -- if you
25 have to make a determination of the type of

1 material that's being recycled, it has to be a
2 material that's a solid waste that has been
3 abandoned by being disposed of or -- or it's
4 accumulated, stored, or treated, but not recycled
5 before, in lieu of being abandoned, materials that
6 are recycled when they are applied or placed to the
7 land that constitutes disposal. I'm getting
8 confused.

9 MR. LINSIN: Objection.

10 THE COURT: Sustained. Withdraw the
11 question and then do what you think you have to do
12 next.

13 MR. PIAGGIONE: You're right, your Honor.
14 BY MR. PIAGGIONE:

15 Q. Doesn't abandoned also indicate -- excuse me.
16 Doesn't abandoned also include by being
17 accumulated, stored, or treated before or in lieu
18 of being abandoned by being disposed of, burned, or
19 incinerated? Is that correct?

20 MR. LINSIN: Objection to form.

21 THE COURT: Sustained.

22 BY MR. PIAGGIONE:

23 Q. Abandoned is defined in 261.2 as being stored
24 in lieu of the disposal, isn't that true?

25 A. That is accurate.

1 Q. Okay. And it's your opinion that material in
2 the tanks, which was from before 1978 and stayed in
3 those tanks until 2009, was not stored in lieu of
4 disposal, is that correct?

5 A. It's my opinion that the material in those
6 tanks was already abandoned prior to 1978, and I
7 believe there was even a stipulation on that fact.

8 Q. And weren't you in the EPA when they created
9 the interim status for facilities that were storing
10 hazardous wastes before 1980 and carried them over
11 past the effective date of RCRA?

12 A. That would have been true if the material was
13 being stored on the land prior to -- or in the
14 tanks prior to the date -- effective date of RCRA.
15 But in this case the material had already been
16 abandoned. It had been abandoned, discarded,
17 thrown away. So it couldn't -- it wasn't affected
18 by RCRA when the effective date of RCRA occurred.
19 It had already been thrown away. It was an
20 inactive waste unit, and RCRA did not regulate
21 inactive waste management units.

22 Q. Isn't it true, when you were in EPA, that, in
23 fact, materials left in tanks prior to 1980, when
24 RCRA went into effect, became subject to RCRA as
25 under interim status as being stored subject to

1 RCRA?

2 A. Completely depends on the circumstances of the
3 situation. It is possible that if there was an
4 intent to use that material it could have been
5 considered storage, in which case it would have
6 been regulated under RCRA after the effective date
7 of the regulations. But if it was already
8 abandoned because the intent was there was no more
9 use for it, it was just being thrown away, then it
10 was -- the fact that was in a tank is not what's
11 relevant. The fact that it was abandoned and there
12 was no intent to use it at the time Tonawanda Coke
13 purchased the facility in 1978 meant that it was
14 not brought into RCRA at the time that the RCRA
15 regulations became effective.

16 Q. You heard the testimony of Mr. Strickland, is
17 that correct?

18 A. I was in the courtroom, yes.

19 Q. And you read the testimony of Mr. Flax?

20 A. I did.

21 Q. And they testified that the waste in the tanks
22 which carried over from 1978 to 2009 was subject to
23 EPA regulation, isn't that correct?

24 A. I mean, I don't have their testimony memorized.
25 I mean, they may have said that. But, I mean, I

1 would also point out, as I have read the criminal
2 indictment in this case, it doesn't deal with
3 storage of material in the tanks.

4 Q. The question was: Did you -- did you read and
5 heard their opinions that indicated that this
6 material was subject to RCRA? Isn't that correct?

7 A. I read their -- I read their -- I read
8 Mr. Flax's testimony, and I did hear
9 Mr. Strickland, and, frankly, some of it was
10 confusing to me as to what they were postulating
11 for why that material was regulated. But it wasn't
12 clear to me whether they were saying the material
13 in the tank had always been regulated or -- what I
14 thought Mr. Flax was saying was after there was
15 some release of the some material after the fire,
16 he thought that material was being stored. But
17 I'm -- you know, I mean, I'm not an expert on what
18 he said. I have my own opinions as to whether that
19 material was regulated, and I don't believe it is.

20 Q. Okay. So your opinion was, again, different
21 from the EPA officials and the DEC officials who
22 testified in this case, isn't that correct?

23 A. Well, I think I'd be more comfortable answering
24 by saying my opinion is what my opinion is, and
25 I'll leave it to you to decide whether or not my

1 opinion is different from the EPA opinions.

2 Q. Okay. With respect to this chart you have for
3 0000, K087 waste would not be in the middle part of
4 this, isn't that correct?

5 A. When you say it's not in the middle part of
6 this --

7 Q. The white box, which says "Is material
8 discarded," it's not subject to that sort of
9 analysis, isn't that correct?

10 A. Well, it's my opinion that the K087, when taken
11 to the coal piles in the coalfield for the purpose
12 of mixing -- it's my opinion that you answer no to
13 all these provisions and you end up on the
14 left-hand side of the chart.

15 Q. Isn't K087 waste a listed waste by the EPA?

16 A. I feel like we've gone over this. It's a
17 listed waste if it's -- it's a listed hazardous
18 waste if it's also a solid waste. And the purpose
19 of going through the items in the middle of this
20 chart is to figure out the answer to the question
21 of whether it's a solid waste.

22 Q. And isn't the only reason it would not be a
23 solid waste is if it was being legitimately
24 recycled?

25 A. If it was being legitimately recycled in

1 certain ways that don't include the ways in the
2 center of the chart.

3 Q. So it would not be in the center of the chart,
4 is that correct?

5 A. I'm sorry. I'm pretty confused at this point.

6 MR. LINSIN: Your Honor, I'm going to
7 object to the form again. The witness, first of
8 all, I think tried to answer the previous question,
9 and --

10 THE COURT: Well, as to the form of the
11 question, that objection sustained.

12 MR. LINSIN: Thank you.

13 BY MR. PIAGGIONE:

14 Q. K087 waste is a listed hazardous waste, isn't
15 that -- you stated unless it is being legitimately
16 recycled, isn't that correct?

17 A. K087 -- it's not exactly correct. K087 is a
18 listed hazardous waste. It may or may not be a
19 solid waste, depending upon how it's recycled.

20 Q. And the difference of opinion between how it is
21 recycled -- the difference -- excuse me.

22 Withdrawn.

23 The difference of opinion between the EPA
24 officials and the DEC officials and your opinion is
25 that the recycling occurs when it's placed in the

1 coke ovens, as opposed to your first step, which is
2 mixing on the coal pile, isn't that correct?

3 A. That is the one of the reasons. It's also my
4 opinion that placement of the material on the coal
5 piles for mixing is not land disposal under the
6 definition that's being applied in this case.

7 Q. Okay. You did not say that the mixing of the
8 coal tar sludge and the coal was the first step of
9 recycling, therefore land disposal is not applied?

10 MR. LINSIN: Your Honor, the witness has
11 said both things, and so I object to -- this is
12 beginning to feel like badgering.

13 THE COURT: Well, I think you need to move
14 on here, Mr. Piaggione.

15 BY MR. PIAGGIONE:

16 Q. The first stop in recycling for the K087 waste,
17 you said -- stated, was when it was mixed on the
18 coal piles, is that correct?

19 A. It is my opinion that that would be the
20 appropriate way to look at it. But independently
21 of that, it is also my opinion that mixing going on
22 on the coal piles in the coalfield does not
23 constitute land disposal as that term has been used
24 in this matter.

25 Q. Again, I only asked you about the first step in

1 recycling, not anything about land disposal. If
2 you could please answer the question.

3 MR. LINSIN: I object, your Honor.

4 THE COURT: Sustained.

5 MR. PIAGGIONE: With respect to the first
6 step of recycling, the DEC officials testified and
7 the EPA officials testified --

8 MR. LINSIN: Objection, your Honor.

9 THE COURT: Let's move on, Mr. Piaggione,
10 please.

11 BY MR. PIAGGIONE:

12 Q. With respect to the materials that were left on
13 the ground that you said were not actively managed,
14 did you read the testimony of Mr. Rogers, which
15 indicated that the material was moved from where it
16 was located originally over to and closer to the
17 two tanks on the property?

18 A. I did read that testimony, yes.

19 Q. And it's your opinion that that was not
20 disturbing the material?

21 A. It's my -- it's my opinion that there was no
22 action taken that was intended to move that
23 material. That movement, to the extent it
24 happened, was incidental to putting a cover over
25 that material. In my opinion, in my experience,

1 that does not qualify as active management.

2 Q. So you read an intent into an active
3 management? Is that it?

4 A. Well, again, I'm going by the definition that
5 was provided for this case, and it talks about
6 taking an action that would result in physical
7 disturbance and -- or adding additional waste, and
8 under my reading of it, I don't believe that's what
9 was happening. I believe it would be no different
10 than if I were trying to construct, let's say, a
11 road next to an old waste unit, and in my process
12 of constructing a road some of the gravel fell into
13 the old waste unit. It's incidental disturbance.
14 It has nothing to do with what I was really doing.
15 So that's my opinion on how that definition would
16 be applied.

17 Q. And Mr. Flax's opinion disagrees with your
18 opinion, is that correct?

19 A. You know, you're -- I'm finding it difficult to
20 answer your question. I did read his testimony,
21 but I really don't feel like I'm an expert on his
22 testimony, so I feel like I'd be more comfortable
23 if you would just ask me about my testimony.

24 Q. Okay. If Mr. Flax testified that the movement
25 of this material from where it was to closer to the

1 tanks constituted active management, that would be
2 in disagreement with your opinion, isn't that
3 correct?

4 A. That would be correct.

5 Q. And if Mr. Strickland testified that the
6 movement of that material that was on the ground
7 over to the storage tanks was active management,
8 that would be in disagreement with your opinion, is
9 that correct?

10 A. Again, you're talking about the movement that
11 occurred when the coke breeze was put on --

12 Q. And run over with heavy equipment, yes.

13 A. Yes. My opinion would be in disagreement with
14 that opinion.

15 Q. Okay. And your -- and if Mr. Flax testified
16 that the mixing of the coal breeze with the coal
17 tar sludge -- excuse me -- mixing of the coal
18 breeze with the material on the ground constituted
19 a change --

20 MR. LINSIN: Your Honor -- form of the
21 question, your Honor.

22 THE COURT: Why don't the attorneys join
23 me here. And, ladies and gentlemen, we'll be right
24 back with you. Are you doing okay? Okay.

25 (Side bar discussion held on the record.)

1 THE COURT: Okay. You have, I mean, it's
2 form-of-the-question objection, I think. How much
3 more do you have? And the reason why I ask is, you
4 know, very honestly -- do you have a lot?

5 MR. PIAGGIONE: Not a lot, your Honor. I
6 haven't -- not a lot. If you want to adjourn for
7 five minutes or so. I've got about five minutes
8 left.

9 THE COURT: I may do that, but I'm going
10 to just tell you right now, if it continues this
11 way, I don't think it should go on. Frankly, the
12 jury is somewhat tuned out.

13 MR. PIAGGIONE: Yes.

14 THE COURT: And if there are additional
15 objections along these same lines, I will sustain.

16 MR. LINSIN: I'm trying to resist, your
17 Honor. I just -- I feel like we're going over and
18 over the same topics. The form is not clear in
19 terms of what is even being asked about, and I --
20 the witness has indicated that confusion
21 repeatedly, and I just -- I would ask that we
22 expedite this process rather than drag it out.

23 THE COURT: Okay. I'll give you the five
24 minutes.

25 MR. PIAGGIONE: Thank you, your Honor.

1 THE COURT: But I expect it to be short
2 and to the point, and then we'll try to wrap up
3 this witness in short order. Okay?

4 MR. PIAGGIONE: Okay.

5 THE COURT: I'm going to give the jury
6 five minutes outside of the courtroom, so they just
7 get --

8 (End of side bar discussion.)

9 THE COURT: Okay. We're going to move
10 things along, but we want to give you like a
11 five-minute break so we can get everything
12 assembled here. We will bring you back, try to
13 finish up Miss Williams, and send you home with a
14 day off as a bonus.

15 THE JURY: Our questions for the witness?

16 THE COURT: Yeah, you're going to have the
17 opportunity to do that as well, okay. I think we
18 need to do that, because you're not going to see
19 Miss Williams again. Okay? All right. Does
20 anybody object to my questions? All right. We'll
21 see you in five minutes.

22 (Jury excused from the courtroom.)

23 THE COURT: You want to take a five- or
24 ten-minute break?

25 (Short recess was taken.)

1 (Jury seated.)

2 THE COURT: Okay. Welcome back. Have a
3 seat, and we'll get started. The attorneys and
4 parties are back present.

5 Mr. Piaggione, I think you will resume as far
6 as Marcia Williams is concerned. She remains under
7 oath. And we'll wrap up.

8 MR. PIAGGIONE: Thank you, your Honor.

9 BY MR. PIAGGIONE:

10 Q. Miss Williams, you make a reference to
11 continuous production process?

12 A. Yes.

13 Q. Where is that located in the RCRA regulations?

14 A. Well, it's actually located in 261.6 of the
15 regulations, and that's the section that says that
16 the recycling process itself isn't regulated, and
17 you have to combine that with the fact that the
18 only thing that is regulated is storage before
19 recycling. So there's no definition in the
20 regulations, but if you look at what's regulated,
21 you'll see that the recycling process itself is
22 exempt from requiring any type of permit.

23 Q. So that term is not defined in RCRA, is that
24 what you're saying?

25 A. It's only discussed in preamble language.

1 Q. Okay.

2 THE COURT: When you say "term," you're
3 talking about the continuous production process?

4 MR. PIAGGIONE: Yes, your Honor.

5 THE COURT: Okay.

6 BY MR. PIAGGIONE:

7 Q. And with respect to the land-based production
8 units, that refers to something that occurred in
9 2008, is that correct?

10 A. Well, the terminology was introduced in 2008.
11 The actual concept was -- existed before then, but
12 the -- the new term was included in the regulations
13 in 2008.

14 Q. Could we have Government's Exhibit 3.04 already
15 in evidence, please?

16 Miss Williams, it's your opinion that this
17 material in the tank depicted in this photo is not
18 being actively managed, is that correct?

19 A. Yes. It's my opinion that that is part of a
20 material that was abandoned prior to the effective
21 date of RCRA.

22 MR. PIAGGIONE: No further questions, your
23 Honor.

24 THE COURT: Okay, Mr. Piaggione. Thank
25 you.

1 Any redirect, Mr. Linsin?

2 MR. LINSIN: I have no redirect questions,
3 your Honor. Thank you.

4 THE COURT: Okay. Mr. Personius?

5 MR. PERSONIUS: Thank you, no, Judge.

6 THE COURT: Okay. All right. Ladies and
7 gentlemen, if you have any questions that you would
8 like me to consider asking, if you would --

9 Chris, we're going to put you to real use this
10 afternoon. So let's see if you can collect
11 anybody's questions that want to be submitted to me
12 for consideration, and I'll review them and discuss
13 them with the attorneys.

14 Does anybody mind if I would just run these and
15 have copies made, and then I'll distribute them to
16 the attorneys, and we can work off of the copies,
17 is that okay?

18 MR. LINSIN: That would be very helpful.
19 Thank you, your Honor.

20 THE COURT: It should only take a second,
21 if you wouldn't mind, and put them all on one page
22 except this one, because this one has both sides,
23 okay?

24 Mr. Moeller has been looking forward to
25 becoming a courtroom deputy and manager for years

1 now, ladies and gentlemen. The very first
2 opportunity that he's had. My problem is he's
3 probably retained an agent, and I'm going to have
4 to negotiate an increase in salary.

5 I hope you don't mind that I did that. But
6 it's difficult when I have to run the questions by
7 the attorneys and I'm the only one that has a copy,
8 so it makes it a little bit difficult for them to,
9 even without notes, understand what I have to say,
10 and then when I have notes, it's equally as
11 difficult I think. So, just bear with us, and
12 we'll get through it. And thank you.

13 It really is important that you make the effort
14 that you're making to stay engaged in this case.
15 Because, you know, there is a lot of effort that's
16 gone into it from your standpoint and everybody's
17 standpoint, and it's the only way we can get to
18 resolve this case. Because, as I've said to you at
19 the beginning when we were impaneling the jury,
20 that when this is all over with, there will be
21 nobody, frankly, that will have the information
22 that you have to the extent that you will have in
23 trying to resolve all of the issues in this case.
24 And you know it's an important case. It's a
25 criminal case, and it involves the defendants, who

1 have entered these not guilty pleas all along the
2 line, 1 through 19, and the government who's
3 charged with the responsibility of enforcing the
4 laws of the United States.

5 So, we have to apply the rules. This is what
6 our system is about, getting individuals like
7 yourselves that are willing to really do the kind
8 of hard work that you're doing right now to get the
9 case resolved by unanimous verdict. That's really
10 a significant contribution to our system of
11 justice. So, we are very, very grateful. And I'm
12 speaking for myself, but I know that that's the
13 sentiment of all of us, because we do take this
14 responsibility and these duties very seriously.

15 From the length of time that it's taken for
16 Mary to get back here, I'm kind of running out of
17 things to say. There she is. Okay. It's a
18 question of respect, ladies and gentlemen.

19 And probably what I'm going to do here is
20 handle the questions randomly, but I'm going to do
21 it in numerical order, so the juror with the lowest
22 number in our grouping, I'll take that question
23 first, and I'll discuss it with the lawyers and
24 we'll move on.

25 I don't know how that boils down to you, Miss

1 Majerowski, but --

2 A JUROR: It wasn't my question. It was
3 Dawn.

4 THE COURT: You're number five, right --
5 no, you're not. I'm sorry. Thank you. Okay.
6 Now, if I could only count, that would make things
7 go better.

8 Okay. We're going to work with Juror number
9 5's question, and I'm going to ask the attorneys to
10 approach the bench in just a moment.

11 Lets come on up on Juror number 5's question I
12 think.

13 (Side bar discussion held on the record.)

14 THE COURT: All right. This is Juror
15 number 5, this Ms. Funderburk's question. "How can
16 the K087 process be considered recycling if the
17 K087 hit the ground and is not used for a period of
18 time under RCRA." Okay?

19 MR. MANGO: Fair.

20 THE COURT: Okay. Two, "What happens with
21 natural elements, such as rain or snow, when it
22 hits piles within a period of time and not being
23 used, natural runoff? How is that considered to be
24 recycling the tar sludge?"

25 MR. LINSIN: I have no problem with that

1 question either. I might just suggest remove the
2 term under RCRA to the front of each of the
3 questions rather than having it at the end. But I
4 have no problem with the substance of the question.

5 THE COURT: All right. Same thing, Mr.
6 Piaggione?

7 MR. PIAGGIONE: No problem, your Honor.

8 THE COURT: Okay. I think that's a good
9 suggestion, because all these questions are under
10 RCRA. And the question is the natural element,
11 rain or snow, when it runs off coal piles into
12 ditches, would this be considered hazardous waste?

13 I think we can ask that question as well, okay?

14 MR. LINSIN: Okay.

15 THE COURT: Lets do these and we'll come
16 back.

17 (End of side bar discussion.)

18 THE COURT: Okay. Miss Williams, I have
19 three questions for you from one of our jurors.
20 And I'm going to ask all three, okay? And ask you
21 to, if you understand them, answer them to the best
22 that you can.

23 Under RCRA, how can the K087 process be
24 considered recycling if the K087 hit the ground and
25 is not used for a period of time?

1 THE WITNESS: Well, I guess the first part
2 of the answer would be when did the K087 -- if the
3 K087 hit the ground, when did it hit the ground?
4 If it hit the ground before you ever started the
5 recycling process, then that would -- that would
6 potentially be disposal if it wasn't cleaned up.

7 If it hit the ground once it entered the
8 recycling process, that would be similar to what
9 would happen at a production facility if you had a
10 drip or a spill. And I guess it would all depend
11 really on how consequential that was, if it was a
12 very small amount, you know, and it didn't violate
13 any other permits that the facility had.
14 Typically, I mean, small incidental releases do
15 sometimes happen.

16 If a large amount hit the ground even at a
17 production facility, it would need to be cleaned
18 up, and if it wasn't cleaned up, potentially it
19 could be determined to be regulated under RCRA.
20 But I have to say in my experience, I've really
21 never seen that happen at a production facility.
22 And I haven't typically seen it happen in a
23 recycling facility. So I don't know if that
24 answers it.

25 THE COURT: That's your best answer to

1 that question. All right.

2 Under RCRA, what happens with natural elements
3 such as rain or snow when it hits piles within a
4 period of time and not being used, that is, natural
5 runoff. How is this considered to be recycling the
6 tar sludge?

7 THE WITNESS: Well, in terms of what gets
8 into the runoff, let's say when it rains, that, of
9 course, is very dependent upon what the material is
10 and whether that material is soluble in water or
11 it's not soluble in water. And the extent to which
12 it runs off is also very fact specific typically.
13 I mean, it may percolate down into the coal pile.
14 It may make it down a few feet. It may make it
15 down further. So that's all pretty fact specific.

16 If it were a production facility runoff -- let
17 me see if this helps. If there's no coal tar being
18 mixed in with the coal, the runoff -- obviously it
19 rains and the rain hits the coal and the coal
20 itself could contaminate the runoff as well.
21 That's normally handled under a Clean Water Act
22 permit.

23 So if you have recycling that's like
24 production, the normal way in which that kind of
25 runoff is handled is through a Clean Water Act

1 permit.

2 THE COURT: As opposed to RCRA?

3 THE WITNESS: As opposed to RCRA.

4 THE COURT: Okay. And under RCRA -- this
5 is the last of three -- is the natural element rain
6 or snow when it runs off the coal piles into
7 ditches, would this be considered a hazardous
8 waste?

9 THE WITNESS: The answer -- it's a good
10 question. Again, if it was -- if K087 waste
11 actually mixed with that material, it could be
12 considered a hazardous waste. But, again, if it --
13 if the K087 had already entered into the recycling
14 process, it wouldn't be K087 at that point.

15 So again it depend -- if -- if when the rain
16 hits it it's a hazardous waste and a solid waste at
17 that point in time, and then the rain hits it and
18 the rain mixes with it so that what's running off
19 is really a combination of both the rain and some
20 of the material in the K087, then it can be a K087
21 waste.

22 But if it's already in the recycling process,
23 then it wouldn't be a solid waste, so it wouldn't
24 be a hazardous waste, and the runoff would not be a
25 K087. So it's a complicated answer. But it

1 depends on sort of the exact fact pattern.

2 THE COURT: Okay. So it may be a
3 hazardous waste, but not a solid waste, and if it's
4 not a solid waste, then it's not RCRA regulated?

5 THE WITNESS: Well, if it's -- if it's
6 already in the process of recycling, at that point
7 it would be really -- it wouldn't really be a waste
8 at that point. There would be runoff, and if you
9 collected that runoff and tested it, you might find
10 that it was hazardous, you might find it isn't.

11 THE COURT: And we're talking about the
12 runoff. But is it a solid waste at that point once
13 it's collected off of the recycling process?

14 THE WITNESS: If it's collected in one
15 place, yes, it could be a solid -- it would be a
16 solid waste, unless you were going to recycle it.
17 The runoff now we're talking about.

18 THE COURT: Okay. Those are the answers
19 to three questions.

20 The next would be from Juror number 9. If you
21 take a look at that and come up here, please.

22 (Side bar discussion held on the record.)

23 THE COURT: Okay. As I read this
24 question, the question is intent versus impact.
25 "Is this what determines how RCRA views the active

1 treatment or management of K087? Does this
2 determine how the treatment is classified?"

3 MR. MANGO: That is a tricky question,
4 your Honor, because obviously there's the intent in
5 this case is just simply a knowledge element under
6 RCRA. And we've already obviously handled the
7 issue regarding is there an intent to dispose
8 necessary in RCRA, and your Honor's already ruled
9 that there is not.

10 THE COURT: But the knowledge element will
11 be made and defined for the jury.

12 MR. MANGO: Yes.

13 THE COURT: With respect to the essential
14 elements, so --

15 MR. LINSIN: Your Honor, my suggestion on
16 this question would be that the first line of the
17 question simply be struck, so that the question
18 would read what determines how RCRA views the
19 active treatment or management of K087. Does this
20 determine how the treatment is classified?

21 THE COURT: That does eliminate the entire
22 quandary as far as intent and knowledge and
23 definition so -- well, let's try it. Let's see if
24 we have an issue with that.

25 MR. MANGO: Your Honor, one thing I wanted

1 to bring up. This is off topic, but there was a
2 reference to treat and dispose in one of the counts
3 of the indictment. We had moved to take that treat
4 language out, so --

5 THE COURT: Oh, that's right. I decided
6 that too.

7 MR. MANGO: You decided it and it was
8 taken out. I don't know if it --

9 MS. GRASSO: It was left in in one spot.

10 MR. LINSIN: It remains unfortunately in
11 the text in one part of the count, the verb or the
12 earlier part of Count 18 is just dispose of, but
13 then it references a -- without a permit to treat
14 or dispose. So, that's why the witness had focused
15 on the issue of disposal.

16 THE COURT: Yeah.

17 MR. MANGO: I think that -- we would have
18 made -- if we didn't, I'll have to look at our
19 motion to strike, but we would have asked -- we
20 would now ask to take that language out too as
21 surplusage.

22 THE COURT: Okay. But it was in the
23 indictment.

24 MR. MANGO: Yeah.

25 THE COURT: I was looking at it. But I do

1 remember that. Okay. Okay.

2 MR. LINSIN: All right.

3 THE COURT: Well, let's do this question.

4 (End of side bar discussion.)

5 THE COURT: All right, Miss Williams,
6 they're counting on you to answer this now.

7 THE WITNESS: Okay. I'll do my best.

8 THE COURT: Okay. And I think you can see
9 that the jurors consider this to be very important,
10 so --

11 What determines how RCRA views the active
12 treatment or management of K087? In other words,
13 does this determine how the treatment is
14 classified, question mark.

15 THE WITNESS: Let me think about this for
16 a second. I'm not sure if I totally understand it.

17 THE COURT: Sure.

18 THE WITNESS: Could I just -- could you
19 read it for me one more time?

20 THE COURT: Absolutely. What determines
21 how RCRA views the active treatment or management
22 of K087? That is, does this determine how the
23 treatment is classified?

24 THE WITNESS: I'm a little confused about
25 whether the word treatment is meaning treatment in

1 the RCRA like --

2 THE COURT: We're going to do it in
3 context of RCRA.

4 THE WITNESS: So RCRA treatment, the way
5 the word is used in the regulation?

6 THE COURT: Yes.

7 THE WITNESS: Okay. Well, as I explained,
8 RCRA -- there is a definition of RCRA treatment.
9 And if you have a solid waste -- a material that is
10 both a solid waste and a hazardous waste, and if
11 that material is changed either physically,
12 chemically, or biologically for one of those
13 purposes that's in the definition -- so let's just
14 say if it was changed chemically because you want
15 to neutralize it, then that would be a
16 RCRA-regulated activity. The exact nature of the
17 RCRA regulation might depend on the exact type of
18 treatment and how you were doing it. I don't know
19 if I've answered the question.

20 But in other words, RCRA treatment, if you take
21 a newly generated waste, and you're going to -- you
22 want to do something with it, you want to treat it,
23 you look to see if it meets both -- if what you're
24 doing to it meets both parts of this definition.
25 And if so, assuming it's both a solid waste and

1 hazardous waste, then it would be regulated in some
2 fashion. It might need a permit, it might not. It
3 would depend on exactly what was being done.

4 THE COURT: Now are you contrasting that
5 with management?

6 THE WITNESS: Well, active management -- I
7 think there is a definition that has been provided
8 for what's active management. I was talking about
9 the treatment piece.

10 THE COURT: Okay. So the definition of
11 active management is set for purposes of the
12 instruction the jury will get.

13 THE WITNESS: Yes.

14 THE COURT: But given that, and without
15 referencing that definition at this point, is there
16 any way that you can contrast the two for purposes
17 of answering this question?

18 THE WITNESS: Other than to sort of go
19 back to the definition that will be provided, which
20 I don't think I should -- you would want me to do,
21 I think -- I mean, the concept of active management
22 comes into play if something has already been
23 abandoned, and then you actively manage it. And
24 the concept of active management is you might bring
25 it back into the system in a way that it could be

1 regulated again.

2 If it's already been discarded before the
3 effective date of the regulations, it's not
4 regulated. If it's actively managed based on the
5 definition that will be in effect for this case,
6 then it could be brought back in and you'd
7 reclassify it at that point and figure out if it
8 was covered by RCRA.

9 THE COURT: And that's different from
10 active treatment how?

11 THE WITNESS: Well, the definition of
12 treatment is different from the definition of
13 active management. So, it's possible that if you
14 were -- let's take an inactive waste unit. If you
15 are actually doing something in that unit to treat
16 the waste, then it would constitute active
17 management. I don't know if that helps, but -- so,
18 if you were treating material that had been
19 previously abandoned after the date the regulations
20 took effect, then that -- then that treatment would
21 likely constitute active management.

22 THE COURT: If you have a follow-up
23 question, I'll allow you to ask it if you write it
24 out, because I see some heads. We'll work with
25 that.

1 Let me ask the next question, which I think
2 while everybody -- well, we will break. But I
3 think this is a little less complicated, if you
4 will.

5 I think the question to you is how do you know
6 how deep the coal is under the piles, because you
7 rendered some of your answers and opinions based on
8 how deep you believed that the coal was. And I
9 think that's what the question is directed to.

10 THE WITNESS: I saw reference to that in
11 some of the interviews, the Government Exhibits
12 interviews of the Tonawanda Coke employees that
13 discussed the depth of the coal field underneath
14 the piles.

15 THE COURT: Okay. All right. We're going
16 to try to get back to your question through the
17 follow-up questions, and if you have another one --
18 this is on the earlier one, I'll take another look
19 at it, if it's not satisfactory to the jurors.

20 Okay. This question that comes up next, and I
21 won't call the attorneys up here, because it's the
22 same question essentially but from another one of
23 the jurors. And "How did you determine the depth
24 of the coal in the coal field at Tonawanda Coke
25 that you mentioned in your testimony?" And you've

1 answered that for us, right?

2 THE WITNESS: Yes.

3 THE COURT: Unless there's an objection or
4 you want a discussion, I'm going to ask the next
5 question on this last sheet.

6 MR. MANGO: That's fine with the
7 government.

8 MR. PERSONIUS: Okay with us, Judge.

9 MR. LINSIN: No objection, your Honor.

10 THE COURT: Okay. And this is depth of
11 coal related I think. "What is the proper depth of
12 coal under RCRA regulation that allows K087 to be
13 considered legitimately recycled in the coal
14 field?"

15 THE WITNESS: The regulations don't have
16 any specified depth. I think what the regulations
17 say is if you put it back into the normal
18 production process, and then it would be not a
19 solid waste. So I think that's the guidance that
20 the regulations can give you. So if it's being
21 done in a raw material pile, there's no specified
22 thing that -- part of the regulation that says
23 well, that has to be 5 feet above the ground or
24 2 feet. It just -- the regulations just talk about
25 putting it back with the feedstock.

1 THE COURT: Okay. Okay. Are there any
2 other questions that -- and I'll give you a little
3 bit of time to write them out in follow-up to where
4 we're at at the present time.

5 And, Mr. McDonell, I'm going to be giving some
6 definitions that relate to certain of the
7 elements -- well, the critical elements of the
8 different charges at the end of the case that
9 should be of assistance I think in terms of matters
10 like knowledge and the like, so -- you know, we
11 will try to sort out your question, because I think
12 that's the one that was being discussed answer-wise
13 that some of the jurors were looking a little
14 perplexed. And we'll try to get that straightened
15 out. If you need to follow up with us, we will
16 entertain that. All right.

17 Please, Chris. Did everybody have enough time
18 to write out -- okay. It looked like you were
19 performing some magic on it to make sure that it
20 got here. All right.

21 A JUROR: Do you understand the question?
22 I'm sorry, I don't mean to be out of line here. Do
23 you understand my question?

24 THE COURT: Yeah, I do. And I'll just
25 read this out, because it kind of comes back to the

1 answer that Miss Williams tried to give you, okay.

2 And I think it's going to be obvious to you,
3 Miss Williams. And I'm not trying to lead you or
4 anything, but the jury still has some questions
5 with respect to what is treatment and what is
6 active management, okay?

7 And in the context of Mr. McDonell's question
8 that I read earlier which is: "Under RCRA, what
9 determines how RCRA views the active treatment or
10 management of K087? Does this determine how the
11 treatment is classified?" Okay. So we're talking
12 treatment, management. The jury is perplexed
13 because the question is: "Please elaborate in more
14 detail what is treatment, what is active
15 management." And they're talking about K087.

16 MR. LINSIN: Your Honor, may I --

17 THE COURT: You want to come up?

18 MR. LINSIN: Just very briefly.

19 THE COURT: Sure.

20 MR. LINSIN: I just think it may be
21 helpful.

22 THE COURT: I'm not judging the questions
23 just so you know. That's why we ask you to do
24 this, because whatever we can do to help you
25 clarify in your minds what you need to deal with,

1 that's what we are I trying to accomplish for you,
2 okay?

3 (Side bar discussion held on the record.)

4 MR. LINSIN: The reason I asked to
5 approach is this. The terms "treatment" and
6 "active management" for the purposes of this case
7 relate only to Counts 17 and 18 that deal with D018
8 waste. The jury's task in evaluating those terms
9 and their meaning don't relate to the facts or
10 circumstances regarding the management of K087.
11 And I think that may be part of the witness's
12 struggle here that the application of those terms,
13 as I understand the government's theory, doesn't
14 relate to how the K087 was handled. It relates to
15 the management or interaction with the materials in
16 the tanks or on the ground around the tanks, and
17 so -- I was going to say something earlier, but my
18 concern is that asking the witness to again define
19 how those terms relate to the K087 I think may be
20 taking it further away from an understanding of
21 what the issues really are, because those terms
22 have applicability only for 17 and 18, with respect
23 to the D018.

24 THE COURT: The government disagrees
25 though.

1 MR. MANGO: Yes.

2 THE COURT: How so?

3 MR. MANGO: Your Honor, there is no active
4 management involved in Count 18 of the indictment.
5 That's the scooping out of the material from the
6 tank. That has nothing to do with active
7 management.

8 MR. LINSIN: I stand corrected. And I
9 agree with counsel, your Honor. You're right.
10 Those terms relate only to Count 17. Further
11 making my point I think that asking the witness to
12 discuss those terms with regard to K087 is just
13 going to confuse the issue rather than clarify it.

14 And if -- what I would suggest, if the Court is
15 willing, is that the Court give a preliminary
16 guidance to the jury that those terms, for the
17 purposes of resolving the issues in this case,
18 relate to the material referenced in Count 17, and
19 that -- and ask them -- the witness to address
20 those terms as it pertains to the materials charged
21 in Count 17. And I just think that would help on a
22 number of levels.

23 THE COURT: Okay. I think focusing on
24 Count 17 is a big help.

25 MR. MANGO: Yes.

1 MR. LINSIN: Yes.

2 THE COURT: Directing the witness to
3 respond to those terms in the context of 17 should
4 be a big help. And then I'll further tell the jury
5 that they will get further instructions from me.
6 They're all encompassing. It should be enough for
7 them to apply when it comes to considering
8 Count 17.

9 MR. LINSIN: But as you -- as you pose the
10 question -- or prior to your posing the question
11 focused on 17, if perhaps you could explain that
12 you are modifying it based upon what the -- how
13 these terms actually apply to the charges in this
14 case, and so you're asking the witness to address
15 those charges with respect to the material in
16 Count 17.

17 THE COURT: All right. Agreed?

18 MR. MANGO: Agreed.

19 THE COURT: Okay.

20 (End of side bar discussion.)

21 THE COURT: Okay. I'm going to have them
22 come back just for a second.

23 (Side bar discussion held on the record.)

24 THE COURT: Let me pose something.

25 Mr. Linsin has made the question in scope limited

1 to Count 17.

2 MR. MANGO: Yes.

3 THE COURT: My sense is I can ask the
4 question, but you can probably ask the question
5 better than I can. I propose that Mr. Linsin ask
6 the question, unless the government objects, which
7 would give it its proper focus. If you need to ask
8 a follow-up question, I'll let the government ask a
9 follow-up question. Does that work from your
10 standpoint?

11 MR. MANGO: That's fine.

12 MR. LINSIN: I have no problem.

13 THE COURT: I would be more comfortable
14 with that.

15 MR. MANGO: Just if we can keep it limited
16 to the question and not -- considering where we're
17 at at this point. That's -- no objection, your
18 Honor.

19 THE COURT: All right. I think that makes
20 sense, because I may throw something in there, as I
21 often do, that gets us on another path. So, we
22 don't have to have another line in the chart.

23 MR. PERSONIUS: Judge, you don't want me
24 to ask the question?

25 THE COURT: Absolutely not, Mr. Personius.

1 (End of side bar discussion.)

2 THE COURT: Okay. And, you know, if we
3 need to go a little bit further with this we will,
4 but I think -- if I had to write these questions
5 out, they wouldn't be as good as yours probably in
6 all seriousness. But what I think would be helpful
7 on this particular question and the concern that's
8 expressed is if I let Mr. Linsin ask the question,
9 at my request. And I'll tell you why. Because the
10 question is a question limited to Count 17 only.
11 All right. So that's going to help your focus.
12 And at the end I'm going to give you I think the
13 detailed instructions that will enable you to
14 address any concerns that you may have in the
15 context of the question, because my instructions
16 will be related to Count 17. So I asked Mr. Linsin
17 if he would ask the question relating to Count 17
18 for your benefit, and then that may help
19 Miss Williams. And I'm going to give the
20 government the opportunity to ask a follow-up
21 question if they choose to, so that from their
22 respective standpoints, not mine, okay, because I
23 don't have the perspective that they do, nor the
24 experience, nor the intelligence, to get this out
25 the way that you might want it. So, if that's okay

1 with you, that's the way I'm going to propose to do
2 it.

3 Miss Williams, I think that will, keeping our
4 fingers crossed, make it a more direct way of
5 getting to an answer that will be specific as to
6 Count 17, the only count that's affected by this
7 question. Okay.

8 Mr. Linsin, if you would please, and you know,
9 to make this more informal, stay down there, if you
10 don't mind, please.

11 MR. LINSIN: I'm happy to.

12 THE COURT: And I feel comfortable doing
13 it this way, because it's kind of conference room
14 like discussion, so if you would.

15 MR. LINSIN: I will try to break this into
16 a couple of parts that are faithful to the intent
17 of this question.

18 Miss Williams, in your review of the issues in
19 this case, have you made reference to your
20 understanding of how RCRA defines treatment and the
21 definition of active management that has been given
22 for the purposes of this case? Have you made
23 reference to those definitions?

24 THE WITNESS: Yes, I have.

25 MR. LINSIN: All right. And is it

1 accurate to say that your consideration of those
2 terms relate to the substance of Count 17 in the
3 indictment that concerns the alleged unpermitted
4 storage of material around the Barrett tanks?

5 THE WITNESS: Yes, that's correct.

6 MR. LINSIN: All right. Now with that as
7 predicate, would you please explain to the jurors
8 how you apply those terms "treatment" to determine
9 whether that material had been treated as defined
10 under RCRA, and also how you apply the concept of
11 "activity management" as defined for this case to
12 determine whether that material that was on the
13 ground around the tanks had been either treated or
14 actively managed so it would subject it to RCRA
15 regulation?

16 THE COURT: Do you understand that
17 question?

18 THE WITNESS: I think I do. Yes, I
19 believe I understand it.

20 THE COURT: Okay. All right. So please
21 attempt to answer that and then Mr. Mango.

22 THE WITNESS: Okay. So in my evaluation
23 of Count 17, this was the material that had been
24 abandoned prior to the effective date of the RCRA
25 regulations. And I looked at whether or not that

1 material was actively managed, and I concluded that
2 it was not actively managed.

3 And I also looked at the question of whether it
4 was treated. The reason I looked at the question
5 of whether it was treated was because if it had
6 actually been treated, that could have been a form
7 of active management, so it was really a subset. I
8 looked at the treatment question, because if it had
9 been treated, it could have been an indication that
10 it was actively managed.

11 MR. LINSIN: And what was your --

12 THE WITNESS: It doesn't help?

13 A JUROR: It doesn't, I'm sorry.

14 THE COURT: But so far, right --

15 A JUROR: Your question is posed
16 correctly, but the thing is it's not basically --
17 I'm basically saying okay, there's a mixing of this
18 coal tar sludge with the coke in the piles, okay?
19 Is that mixing of the sludge and the pile, with the
20 mixing, is that a treatment of the mixing, or is it
21 an active management? Which one is it? Is it
22 treatment or is it active management?

23 THE WITNESS: Okay. This is why I think
24 in the question to me Mr. Linsin distinguished
25 between what was going on with K087 on the coal

1 piles from that -- the Count 17 which only dealt
2 with the material -- the D018 material that was in
3 the tanks and around the tanks.

4 So the issue of active management is only
5 relevant for the Count 17 material, the material
6 that was abandoned prior to the date of RCRA. And
7 the reason it's a relevant question for that is
8 because even though it was -- this material was
9 disposed of before the effective date of RCRA, and
10 therefore not normally covered by RCRA, if that
11 material was considered to be actively managed,
12 that could bring it back into RCRA regulation. So
13 that's why -- that's why I was asked a bunch of
14 questions about did I think that particular
15 material, the D018 material, on the ground was
16 actively managed.

17 With regard to the K087 material that was taken
18 from the tar decanter and put on the coal piles,
19 you don't really have -- you don't need to answer
20 the question of whether it was actively managed.

21 THE COURT: For Count 17.

22 THE WITNESS: Well, Count 17 doesn't
23 include K087. So K087 is involved in Count 19.
24 And so for Count 19 that involved the K087, we
25 don't need to answer the question of active

1 management, because we know this material is newly
2 generated. We know it's being managed, and the
3 question is, is it being managed as a solid waste
4 as well as a hazardous waste, and where does the
5 recycling begin. So we don't -- for Count 19 that
6 involves K087 we don't need to address the active
7 management issue.

8 But we do need to address it for Count 17,
9 because that material has already been thrown away
10 a very long time ago. And as a result, it's not
11 covered by RCRA unless you determine that that
12 material has been actively managed in the time
13 frame of the charge.

14 THE COURT: So in the vernacular, the old
15 stuff needs to be actively managed. The new stuff
16 doesn't.

17 THE WITNESS: The new stuff is being
18 actively managed by definition.

19 MR. LINSIN: Your Honor, may I, with one
20 additional clarification, if I may. Count 18
21 addresses the material that was excavated from one
22 of the those tanks, and then put back into the coal
23 piles, mixed in the coal piles. In your opinion,
24 Miss Williams, is the excavation of some of that
25 material active management?

1 THE WITNESS: Yes, it is. The material
2 that's being excavated is actively managed.

3 A JUROR: Thank you.

4 MR. LINSIN: All right. Now that -- that
5 active management of the material that's being
6 acted -- of the material that is scooped out of the
7 tanks, does that active management then subject
8 that scooped out material to RCRA regulation?

9 THE WITNESS: And the answer is it depends
10 on what you're going to do with it. But in my
11 analysis of what was done here, which is it was
12 scooped out -- it's actively managed, it's scooped
13 out, so now you have to go back and say, this
14 material which would classify as a D018 hazardous
15 waste, given what you're going to do with it, is it
16 also a solid waste? And so you go back and do that
17 same analysis, which says if I put it on the coal
18 piles and I mix it, is it a solid waste?

19 MR. LINSIN: And one last point if I may.
20 Once you've scooped out some of that material from
21 the tank, and as you've said, actively managed it,
22 does that active management of the scooped out
23 material change the RCRA status, if you will, of
24 the stuff that's still in the tank?

25 THE WITNESS: No, it doesn't, because that

1 material hasn't been actively managed yet.

2 THE COURT: Okay. Yes, Mr. Mango.

3 MR. MANGO: That's what I'd like to ask
4 the question about. Miss Williams, my name is
5 Aaron Mango. Hello. It's your testimony, so the
6 jury understands this, that in that tank where the
7 material was scooped out, the process of scooping
8 that material out, and what is left behind is now a
9 fresh surface to be exposed to the rain, to the
10 snow, to the wind, to the elements. It's your
11 testimony that that fresh surface now, that clean
12 surface of D018 waste is not being actively
13 managed?

14 THE WITNESS: That's correct. What's
15 being actively managed is what's scooped out, not
16 what's still left.

17 MR. MANGO: Okay.

18 THE COURT: Okay. Progress?

19 A JUROR: Yes. Thank you.

20 THE COURT: Okay. All right. Terrific.
21 Terrific. Okay. You know, I wish I could buy you
22 dinner, but it doesn't work that way.

23 A JUROR: How about some drinks?

24 THE COURT: Well, I could probably do
25 that -- no. All right. We're not going to see you

1 tomorrow, right, so you're going to have a great
2 weekend. We'll see you, though, at 9:30 on Monday.
3 All right. Thank you very much.

4 Please don't discuss the case. Don't do
5 anything to prejudge, because we're going to have
6 more testimony, more witnesses. All right. One
7 more witness I think, perhaps, or thereabouts.
8 Okay. So we'll see you on Monday. Thank you.

9 (Jury excused from the courtroom.)

10 THE COURT: All right. Chris, good work.
11 Thank you, sir.

12 All right, Miss Williams, thanks.

13 That's what happens when you get a highly
14 competent courtroom deputy. All right. He tells
15 you, "Look, Judge, you're not capable of asking the
16 right questions. Defer to counsel." So thank you,
17 counsel, I appreciate it. It made him look better
18 and me better. Thank you very much.

19 MR. LINSIN: Thank you, your Honor.

20 THE COURT: Okay. We'll see you Monday
21 morning, right?

22 MR. MANGO: Yes, your Honor.

23 MR. PIAGGIONE: Weren't we supposed to do
24 the --

25 THE COURT: Yes.

1 MR. MANGO: Well, it does appear, your
2 Honor -- if I may, it may help planning. The
3 government does intend to put on a brief rebuttal
4 case based on the testimony of Miss Williams. We
5 do think there's some inaccuracies in that document
6 that was placed on the screen. Some clarification
7 needs to be made. We'll do that briefly Monday
8 morning.

9 And that's -- that's our intention, but I
10 understand there's still a witness who's going to
11 be testifying Monday morning for the defense.

12 THE COURT: Yeah, we still haven't --
13 okay. Is it just with respect to the exhibit?

14 MR. MANGO: No, your Honor. It's with
15 respect to Miss Williams' entire interpretation of
16 Counts 17, 18, and 19 in this case.

17 THE COURT: Who's your witness?

18 MR. MANGO: Mr. Phil Flax.

19 THE COURT: Okay. All right. As far as
20 the exhibit is concerned, let me tell you where I'm
21 at. I haven't finally decided it. I think it
22 does -- and I think you're right, Mr. Mango, I have
23 to resolve it under 611(a)(1).

24 But I don't view it as a summary of the expert
25 witness's testimony. I don't think it qualifies as

1 that. I think it has some deficiencies, and we're
2 going to have to examine those. One is the
3 exemption box, because there's only one exemption,
4 as I understand it from the testimony. There's no
5 line that goes from that exemption box back to the
6 purple box.

7 And then it's a little bit maybe -- I don't
8 want to say intentionally misleading. I don't want
9 anybody to think that, but in the left side of the
10 chart where the examples are listed, that's exactly
11 what they are. They're not factors that have to be
12 satisfied in order to not qualify for RCRA.
13 They're examples that the witness took out and put
14 in for purposes of reference to this case.

15 I'm not sure that's really accurate. I mean,
16 accurate from the standpoint of does it have a
17 relationship to the determination of non-RCRA
18 coverage on the left side of the chart. So, you
19 know, if we want to talk about that some more, we
20 can, but -- so I think there's some inherent
21 difficulties with the way that chart projects
22 everything.

23 I think it's helpful in large measure, but I
24 don't think it's exactly right yet, and I'll
25 entertain discussion with respect to does it

1 survive on the basis of the explanations that were
2 given to those particular areas of the chart, or
3 can it be utilized in a modified fashion. You
4 know, I'll look at that as well.

5 But right now I think it's definitely
6 problematic from a 1006 standpoint, and I'll leave
7 that with you.

8 MR. LINSIN: All right. We will certainly
9 adjust it, as we have indicated, your Honor, and
10 certainly address this left-hand side. Happy to
11 put in the term "examples" or whatever.

12 The point of that, though, your Honor, is just
13 the witness, as I understood her testimony, was
14 saying that these types of examples, these
15 activities, are, in fact, ones that all result in
16 negative responses to the solid waste categories
17 that she has gone through. And so I don't -- I
18 know the Court wasn't saying it was misleading, but
19 I thought it was helpful to illustrate the kinds of
20 activities that, in her opinion, were not deemed to
21 be solid wastes.

22 THE COURT: Well, I think with her
23 testimony in combine, that might work. But I think
24 alone the way it is, it almost looks like those are
25 elemental to the determination that there's not

1 RCRA applicability in some fashion. Do you know
2 what I'm trying to say?

3 Well, look at it. Because it looks like other
4 than examples. That's what I'm trying to get at.

5 MR. LINSIN: That's what I'm saying, your
6 Honor. I'm happy -- well, we will adjust it in an
7 effort to take into account the Court's concerns.

8 THE COURT: All right. And if it needs
9 further clarification, I'll call on Mr. Personius,
10 and we'll go from there.

11 MR. PERSONIUS: Thank you, Judge.

12 THE COURT: All right. Thank you.

13 MR. PERSONIUS: Judge, are we doing
14 anything with Andrew tomorrow then or no?

15 THE COURT: To answer your question,
16 nothing tomorrow. All right.

17 MR. LINSIN: Nothing tomorrow.

18 THE COURT: We'll do whatever we need to
19 do, jury charge and everything, on Monday. I think
20 it's premature to sit down with everything at this
21 point until I know.

22 MR. LINSIN: Thank you, your Honor.

23 MR. MANGO: Thank you, your Honor.

24 MR. PERSONIUS: Do you foresee, then,
25 summing up on Tuesday, Judge, or maybe Wednesday?

1 THE COURT: What's the date on Tuesday? I
2 should have given you this note. No, it's the
3 24th. Thursday, I think, is the 26th? Right?
4 Because today's the, what, 21st, right? Tuesday is
5 the 26th. Well, I've got to find out, because I
6 have a note from Juror number 6, and that's
7 Miss Majerowski. "Doctor's appointment on
8 Thursday, March 26th, at 8:30 regarding pregnancy
9 and follow-up at Sisters Hospital. The duration of
10 that is unknown."

11 Now, I don't know now if she is talking about
12 the 28th or if she is talking about Tuesday the
13 26th.

14 MR. LINSIN: It could be Thursday and she
15 misstated the date.

16 THE COURT: Okay. I mean, if it's
17 Thursday the 28th, then we probably can get to
18 summations on Tuesday. Okay. Thank you.

19 MR. MANGO: Great.

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CERTIFICATION

I certify that the foregoing is a
Correct transcription of the proceedings
Recorded by me in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Official Reporter
U.S.D.C., W.D.N.Y.